

**An EU Instrument to Counter the Trafficking in Women for
Sexual Exploitation into the European Union.**

By

David Geary

Thesis submitted for LL.M in Comparative, European and International Law.

European University Institute, Florence.

Academic year 1998/99

Supervisor: Professor Yota Kravaritou.

Word Count: 36, 219.

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*"...the belief that there is no
scrap of ground on which real
crimes are tolerated would be an
extremely effective way of preventing
them."*

Cesare Beccaria

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Quote from Cesare Beccaria taken from 'Dei delitti e delle pene', 1764, translated in Bellamy. Beccaria. P 92.

Abbreviations

<i>Asian L.J.</i>	<i>Asian Law Journal</i>
<i>B.C. Int'l & Comp. L. Rev.</i>	<i>Boston College International & Comparative Law Review</i>
<i>Cardozo Women's L.J.</i>	<i>Cardozo Women's Law Journal</i>
<i>Cornell J.L. & Pub. Pol'y</i>	<i>Cornell Journal of Law and Public Policy</i>
<i>CMLR</i>	<i>Common Market Law Reports</i>
<i>CMLRev.</i>	<i>Common Market Law Review</i>
<i>Crim.L.R.</i>	<i>The Criminal Law Review</i>
<i>Dick. J. Int'l L.</i>	<i>Dickinson Journal of International Law</i>
<i>EC</i>	European Community/ Treaty establishing the European Community
<i>ECHR</i>	European Convention on Human Rights
<i>ECtHR</i>	European Court of Human Rights
<i>ECOSOC</i>	Economic and Social Council (UN)
<i>ECR</i>	European Court Reports
<i>EJIL</i>	<i>European Journal of International Law</i>
<i>ELJ</i>	<i>European Law Journal</i>
<i>E.L.Rev.</i>	<i>European Law Review</i>
<i>EU</i>	European Union
<i>Eur.J. Crime Cr.L.Cr.J.</i>	<i>European Journal of Crime, Criminal Law and Criminal Justice</i>
<i>Fordham Int'l L.J.</i>	<i>Fordham International Law Journal</i>
<i>Geo. Immigr. L.J.</i>	<i>Georgetown Immigration Law Journal</i>
<i>GW J. Int'l L. & Econ</i>	<i>George Washington Journal of International Law & Economics</i>
<i>IOM</i>	International Organisation for Migration
<i>ICESCR</i>	International Covenant on Economic, Social and Cultural Rights
<i>JHA</i>	Justice and Home Affairs

Mich. J. Gender & Law

Rev. sc. Crim.

TEU

U. Mich. J.L. Ref.

UN

Va. J. Int'l L.

Yale L.J.

Michigan Journal of Gender and Law

Revue de science criminelle et de droit pénal comparé

Treaty on European Union

University of Michigan Journal of Law Reform

United Nations

Virginia Journal of International Law Association

Yale Law Journal

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Case 4/69	<i>Alfons Lütticke GmbH v. Commission</i>	[1971] ECR 325
Cases 21-24/72	<i>International Fruit Company v. Produktschap voor Groenten en Fruit</i>	[1972] ECR 1219
Case 34/73	<i>Variola v. Amministrazione delle Finanze</i>	[1973] ECR 981
Case 166/73	<i>Rheinmühlen-Düsseldorf v. Einfuhr – und Vorratsstelle für Getreide und Futtermittel</i>	[1974] ECR 33
Case 51/76	<i>Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen</i>	[1977] ECR 113
Case 50/76	<i>Amsterdam Bulb</i>	[1977] ECR 137
Case 34/79	<i>R. v. Henn and Darby</i>	[1979] ECR 3795
Case 269/80	<i>R. v. Robert Tymen</i>	[1981] 2 CMLR 111
Case 53/81	<i>Levin v. Staatssecretaris van Justitie</i>	[1982] ECR 1035
Cases 115 and 116/81	<i>Rezguia Adoui v. Belgian State and City of Liège; Dominique Cornuaille v. Belgian State</i>	[1982] ECR 1665
Case 8/81	<i>Becker v. Finanzamt Münster-Innenstadt</i>	[1982] ECR 53
Case 14/86	<i>Pretore di Salò v. persons unknown</i>	[1987] ECR 2565
Case 12/86	<i>Demirel v. Stadt Schwäbisch Gmünd</i>	[1987] ECR 3719
Case 80/86	<i>Kolpinghuis Nijmegen BV</i>	[1987] ECR 3969
Case 186/87	<i>Ian William Cowan v. Tesoir Public</i>	[1989] ECR 195
Case 68/88	<i>Commission v. Hellenic Republic</i>	[1989] ECR 2979
Case C-6/90 and 9/90	<i>Andrea Francovich & Bonifazi v. Italy</i>	[1991] ECR I-5357

Case C-240/90	<i>Germany v. Commission</i>	[1992] ECR I-5383
Case C-83/94	<i>Peter Leifer</i>	[1995] ECR I-3231
Case C-46/93 and C-48/93	<i>Brasserie du Pêcheur SA v. Germany, and R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others</i>	[1996] ECR I-1029
Case C-265/95	<i>Commissssion v. France</i>	[1997] ECR I-6959
Case C-170/96	<i>Commission v. Council (airport transit visas)</i>	[1998] I-2765

European Court of Human Rights

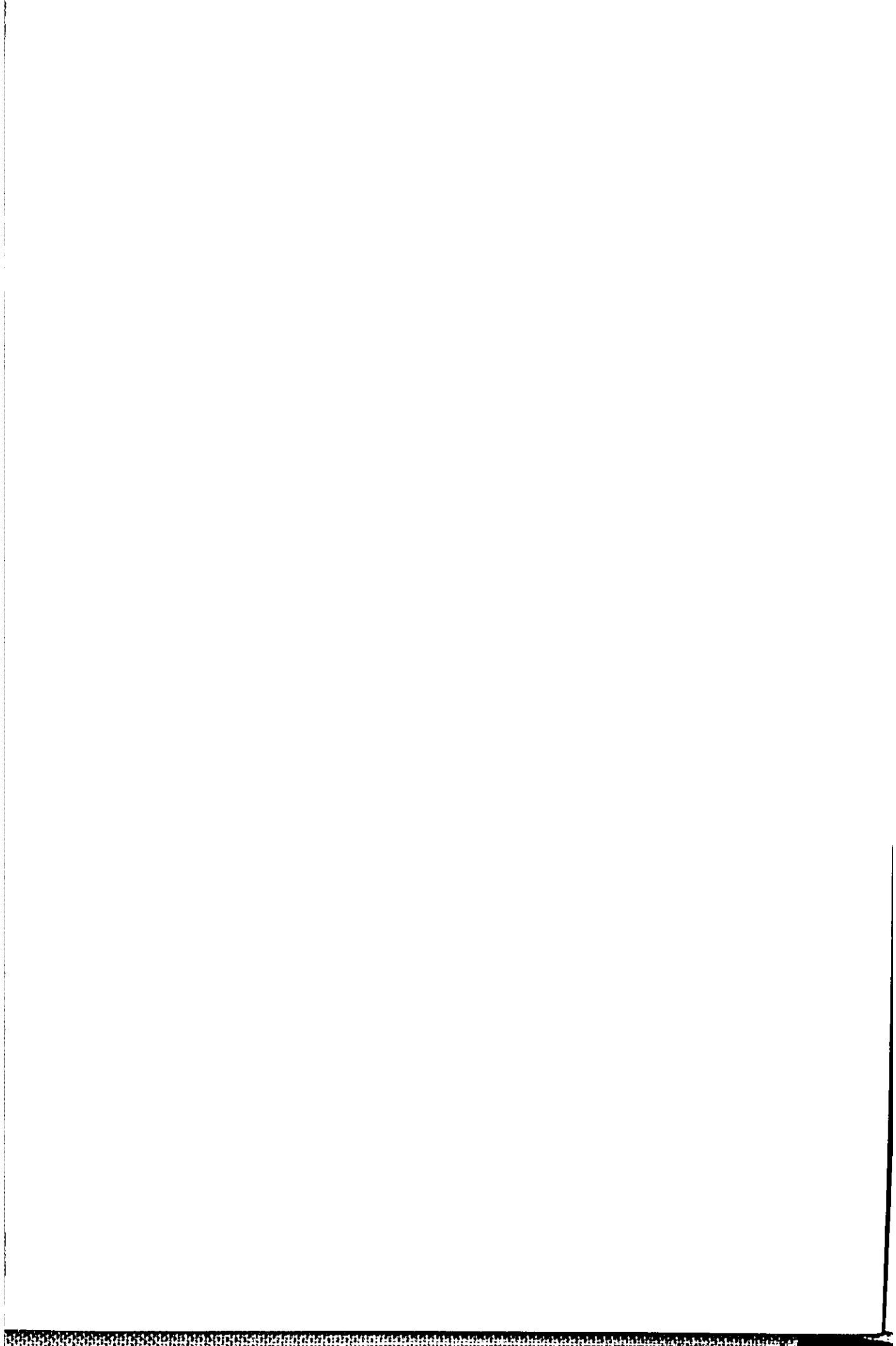
App. Nos. 7601/76 <i>James and Webster v. United Kingdom</i> and 7806/77	44 Eur. Ct. H.R. (ser. A) (1981)
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European Commission on Human Rights

<i>Société Stenuit v. France</i>	(1992) 14 EHRR 509
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United States Supreme Court

<i>Holmes v. Jennison</i>	39 U.S. (14 Pet.) 540 (1840)
<i>Virginia v. Tennessee</i>	148 U.S. 503 (1893)
<i>Champion v. Ames</i>	188 U.S. 321 (1903)
<i>Hoke v. United States</i>	227 U.S. 308 (1912)
<i>Hays v. United States</i>	231F. 106 (8 th Cir. 1916), aff'd, 242 U.S. 470 (1917)
<i>Caminetti v. United States</i>	242 U.S. 470 (1917)
<i>Gebardi v. United States</i>	287 U.S. 112 (1932)
<i>United States v. Darby</i>	312 U.S. 100 (1941)
<i>United States v. Beach</i>	324 U.S. 193 (1945)
<i>West Virginia ex rel. Dyer v. Sims</i>	341 U.S. 22 (1951)



Atlantic Coast Line R. Co. v. Engineers

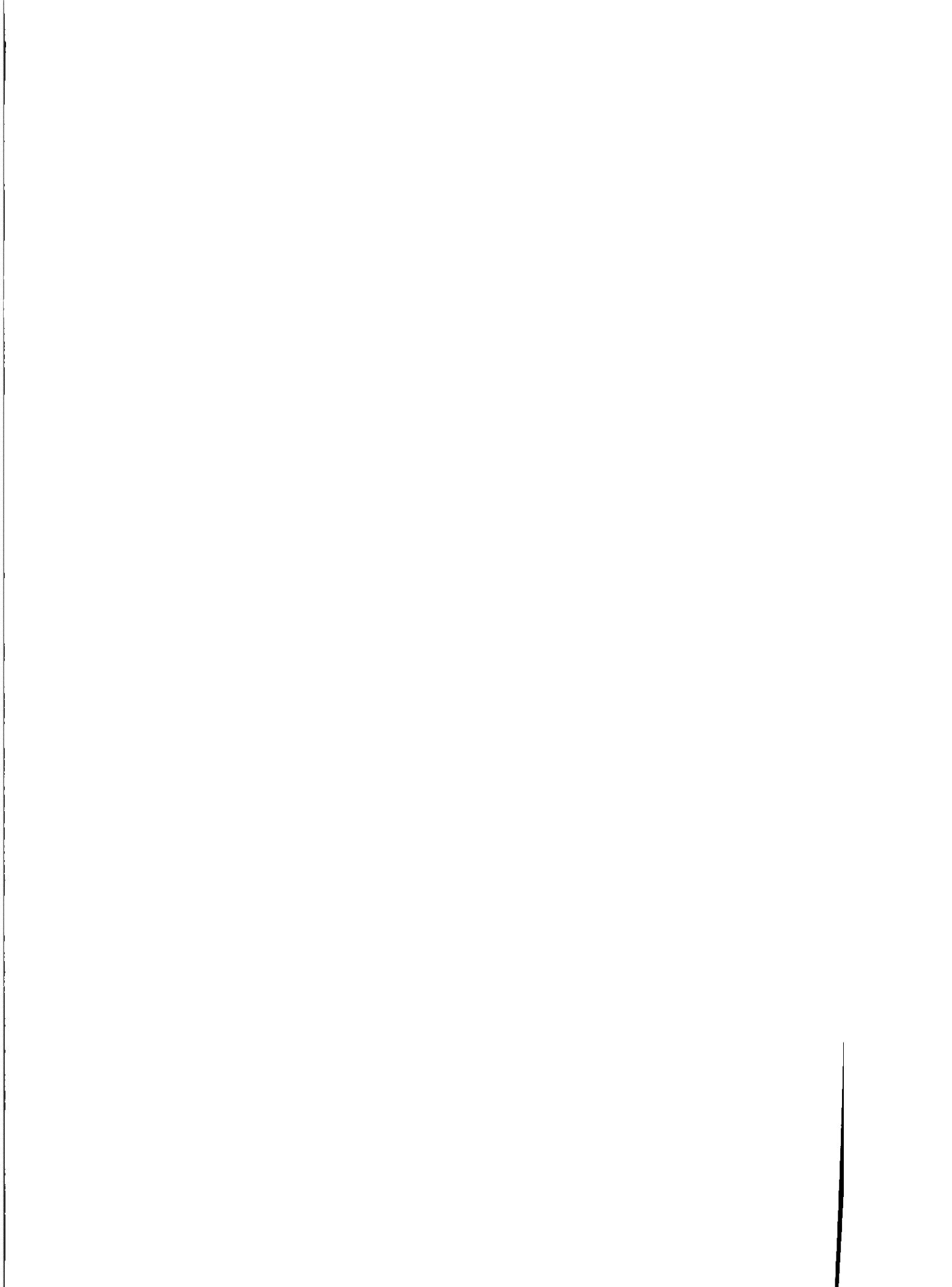
398 U.S. 281, 285 (1970)

United States Steel Corp. v. Multistate Tax Commission

434 U.S. 452 (1978)

Cuyler v. Adams

449 U.S. 433 (1981)



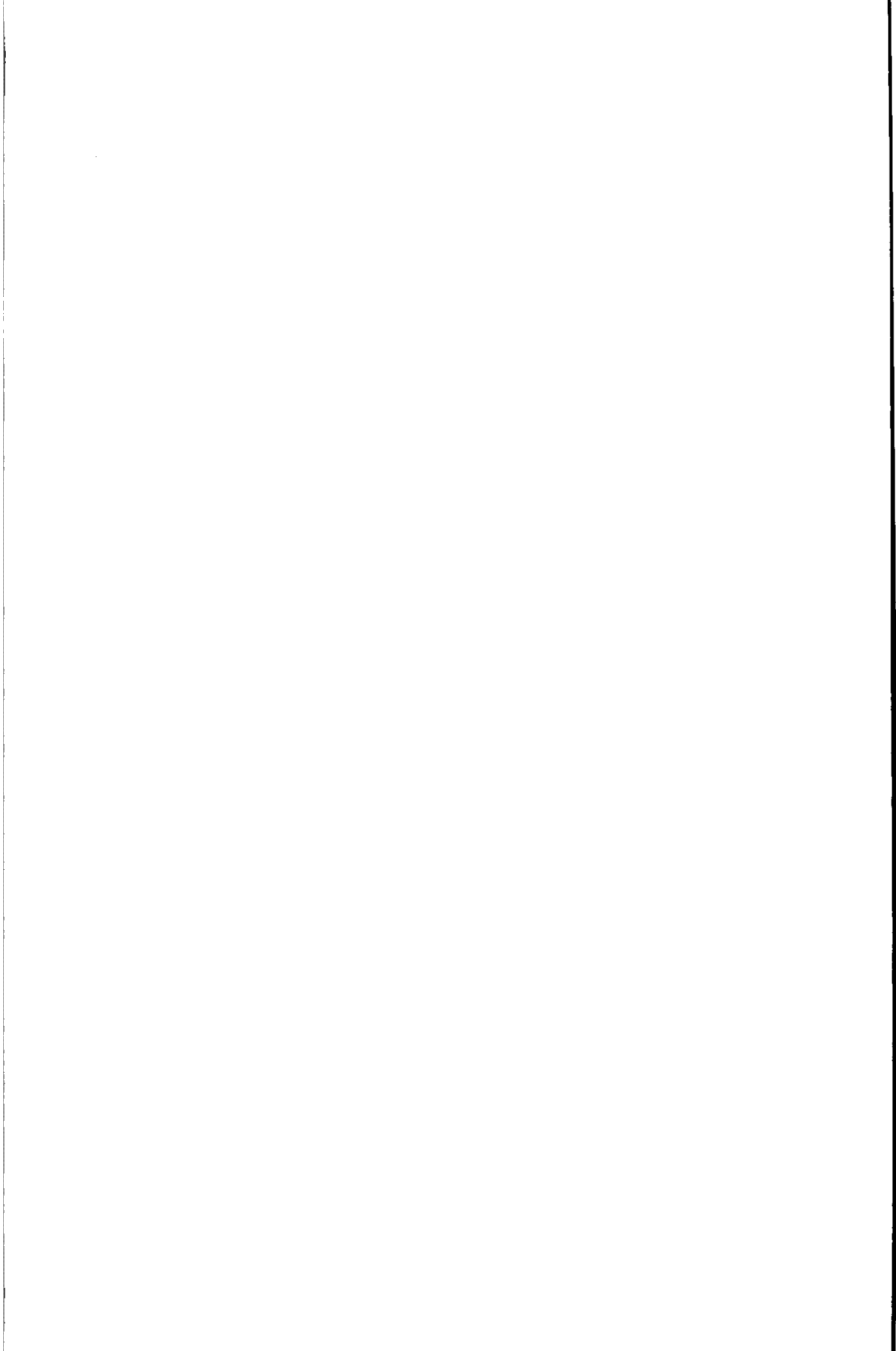
Introduction

The traffic in women for the purpose of sexual exploitation has occurred throughout history and is not a new phenomenon to Europe. Indeed, in the sixth century BC, Solon of Athens is reputed to have conscripted slaves to serve as prostitutes in brothels. For almost a century international instruments have been in force with the specific aim of eliminating this pernicious activity. That efforts to put a halt to trafficking began in earnest at the dawn of the twentieth century, the century when human rights and respect for the individual blossomed, seems fitting. Yet, strangely, it is in the last decade of this century that the Member States of the European Union have witnessed an upsurge in trafficking. Far from eliminating the trade in women, it is the abuse of women and girls which has grown to alarming proportions.

Why is it that the structures set up to stop trafficking in women have not done so ? The answer to this question lies with the instruments themselves. What are the challenges that are preventing us from ending what may be seen as a form of slavery within our states ? This will be a central theme in the first chapter of this paper which will seek to address the difficulties in arriving at a common approach to a shared problem. It is hoped to demonstrate that such an approach is indeed possible and through a brief review of some of the relevant actions taken internationally, the context for the remaining chapters of this paper will be set.

The focus of this paper is the trafficking of women for the purpose of sexual exploitation. Trafficking for this purpose is not limited to adult women, however, and children and also men are victims of this 'trade in human misery'. As females trafficked for prostitution and other forms of exploitation are often very young, there is a clear overlap between the trafficking of women and children. Nevertheless, the trafficking of children raises many issues, which are outside the scope of this paper.

Given the failure of the international instruments on trafficking the mantle has passed to the European Union. The focus of this paper will be how the Union could adopt a binding



instrument to combat the trafficking in women. How will it proceed ? Is this a matter which the EU should seek to address, and if it is, what tools has it at its disposal ? In chapter two these questions will be addressed and the various legislative instruments of the EU will be considered.

With the ever-dynamic nature of European integration, one can expect that the methods and instruments available to tackle issues of common concern to the Member States will be improved upon with time. Indeed, during the period of research for the present paper, the Treaty of Amsterdam was ratified and entered into force. It is appropriate, therefore, to consider how trans-border crimes, such as the trafficking in women, may be approached by a more integrated Europe in the future. The final chapter will consider the new ideas currently under debate in Europe in this regard in the light of the somewhat older ideas of an already integrated America.

Note: For the information of the reader, it should be noted that when referring to the provisions of the Treaty establishing the European Community and the Treaty on European Union the numbering system of the consolidated version of the treaties is used throughout the text, unless otherwise indicated.

Chapter One

Trafficking in Women: Definitions and Context.

1.1 Introduction.

What is trafficking ?

“Trafficking in women means trade in women for sexual exploitation”¹

The trafficking in women for the purpose of sexual exploitation ('trafficking') is the recruitment of women in order to exploit them sexually. It is usually understood to involve the movement of the women from one place to another, particularly between different jurisdictions, and indeed it is this element of trafficking that makes it an issue for international cooperation. The International Organization for Migration (IOM) has defined trafficking in women as follows:

“Trafficking in women occurs when a woman in a country other than her own is exploited by another person against her will and for financial gain. The trafficking element may – cumulatively or separately – consist of: arranging legal or illegal migration from the country of origin to the country of destination; deceiving victims into prostitution once in the country of destination; or enforcing victims' exploitation through violence, threat of violence or other forms of coercion.”²

Strangely, there is no general agreement of what exactly should be considered as trafficking in women for the purpose of sexual exploitation. The definition given above, although far from ideal as we shall see further below, gives the reader a picture of what

¹ HIRSCH, Michèle. Plan of Action against traffic in women and forced prostitution. Strasbourg: Council of Europe, 1996, document EG (96) 2, p 11.

² IOM. Trafficking and prostitution: the growing exploitation of migrant women from central and eastern Europe. Budapest: IOM, 1995. (IOM:1995) p 7.

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may be involved in trafficking in women. For illustrative purposes, a simple example might be of help to the reader in understanding how trafficking might work in practice.

Example: A young woman in an economically depressed country decides to migrate to a Member State of the European Union in order to work. She reads an advertisement in a newspaper, which offers a job as a waitress in a Member State with a very attractive salary. She applies and is told that the 'job agency' (trafficker) will make all visa and transport arrangements. Upon her arrival in the Member State she discovers that the restaurant is in fact a brothel to which she has been sold by the trafficker. She is beaten and threatened and thereby forced to work a prostitute, her living and working conditions controlled by the brothel owner. Further, she is required to pay the costs of her transport and 'purchase' to the brothel owner through a debt bondage arrangement and will never see any of her 'earnings' as a result.

The woman in this (perhaps over-simplistic) example has in fact travelled voluntarily to the Member State in question, the entry into the Union may also have been legal if she met the visa requirements. She has consented to the trafficking and may not even be an illegal immigrant. A trafficked woman could also have been abducted or she may have known that her 'job' would in fact be prostitution but did not expect the slave-like conditions that awaited her. Further, women who are trafficked for the purpose of sexual exploitation may not be 'prostituted' in the classic sense of the term. The IOM has noted that "Trafficking in women is not only for purposes of prostitution but for a range of other activities. For example, the traffic in so-called mail order brides, in practice often means placing the women under sexually slave-like conditions."³

By no means a new phenomenon in Europe, the trafficking in women into the European Union would seem to be on the increase, however it occurs.⁴ In addition, the nature of this activity has changed within the last decade in two important respects regarding the

³ IOM. Trafficking of women to the European Union: characteristics, trends and policy issues, p 3. (Paper prepared for Conference on Trafficking in Women, 10-11 June 1996, Vienna, and available from the European Commission). (IOM: 1996)

3. 1

profile of the victims and that of the traffickers, changes which have occurred as a result of the collapse of the socialist regimes in central and eastern European countries and the resultant decline in the economies of these states.

The victims of trafficking are from countries with poor economic situations⁵ and where the status of women is very much secondary to that of men⁶. Many women from these countries therefore wish to emigrate to improve their lives⁷. Until the fall of the Berlin wall, however, trafficked women originated in countries in the developing world. Since 1990 there has been a marked increase in the number of women from central and eastern Europe who have become victims of trafficking – a direct result of the increase in the number of women in these states who wish to migrate to countries where opportunities for women are better.⁸

Given that opportunities to migrate into the EU are limited, this situation may then be exploited by traffickers who prey on such women. Trafficking European women from one European country to another is, naturally, much easier than trafficking women from other parts of the world and thus the 'post-socialist' situation has presented traffickers with new opportunities. However, not only are more European women being trafficked

⁴ For example, the percentage of victims assisted by one Dutch NGO from central and eastern Europe rose from zero in 1992 to 69% in 1994, IOM: 1995, p 9 and also chapter 2.

⁵ The link between poverty and sexual exploitation is made in virtually all UN documents related to trafficking, although there is a danger of overplaying the poverty argument too. FARRIOR, Stephanie. *The International Law on Trafficking in Women and Children for Prostitution: making it live up to its potential. Harvard Human Rights Journal*. Spring 1997, vol. 10, p 214. See also IOM. *Information Campaign against Trafficking in Women from Ukraine Research Report*. Geneva, 1998.

⁶ Women trafficked to Europe for the purpose of sexual exploitation have traditionally come from countries in the developing world.

⁷ Indeed any long term solution to the problem of trafficking must address the economic disparity between countries of origin and countries of destination and the inequality between men and women which exists throughout the world. Several International Instruments contain provisions which aim at guaranteeing the rights of those who may become vulnerable to trafficking, for example ICESCR (Articles 6 to 13 inclusive) and the Convention on the Rights of the Child. Farrior, loc. cit., p233. THE INTERNATIONAL SEMINAR ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF SEXUAL EXPLOITATION: THE ROLE OF NGOs, Strasbourg, Council of Europe, 29-30 June 1998, recommends that governments should "endeavour to treat the main causes of trafficking, which include the economic situation in the countries of origin as well as the demand existing among men" at p7.

⁸ While precise figures are difficult to obtain, this trend is well documented. See IOM: 1995, op cit., p 8 et seq.

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now than was the case previously but it would also seem that the number of all women being trafficked into the EU is on the increase.⁹

Secondly, the very disturbing increase in organised crime in central and eastern European countries is another relevant factor, prostitution being a classical activity of organised crime and trafficking being extremely profitable for such groups while also being much less risky than other forms of crime¹⁰. Indeed the involvement of organised crime in trafficking seems to be on the increase.¹¹ The link between organised crime groups and crimes committed by migrants trafficked by them in the country of destination is another factor to be noted as such groups also retain control over the migrants upon their arrival.¹² The trafficking of women for prostitution is, in particular, a manifestation of this.¹³

Thus the 'supply' side of the market for trafficked women has undergone significant changes in recent years. The 'demand' side of the market cannot be accounted for so easily¹⁴ but certainly the rather sudden increase in the supply of cheap foreign prostitutes

⁹ Many non-European women continue to be trafficked to the EU. IOM: 1995, op cit., chapter 3. The true numbers involved is not known. Indeed estimates must be taken with a pinch of salt. It has been noted that statistics on organised crime "tend to take on a life of their own and there is seldom any serious attempt to deconstruct the method by which they are compiled", ANDERSON, Malcolm, et al. *Policing the European Union*, Oxford: Clarendon Press, 1995. p 19, quoting Levi in *The European Journal of Criminal Policy and Research*, 1993, vols. 1-3, page 61.

¹⁰ For other forms of international crime, such as drugs or arms smuggling, enforcement is more efficient and penalties more dissuasive.

¹¹ SALT, John. Current Trends in international Migration in Europe. Council of Europe document CDMG (97) 28, November 1997. International Migrations Forum: A Tentative Summary, *EUI Review*, November 1998. SAVONA, Ernesto. Dynamics of Migration and Crime in Europe: new patterns for an old nexus. *Transcrime*. University of Trento, 1996, point 3.2.

¹² "An ever increasing networking among organized crime groups provides for economies of scale and for full control of the smuggling-trafficking sequence; from smuggling to the control of sex markets", UNITED NATIONS. Global Programme against Trafficking in Human Beings - an outline for action. Vienna: United Nations Office for Drug Control and Crime Prevention, February 1999. p 6. Also: BERNASCONI, Paolo. Transborder offences: terrorism, narcotics trafficking, white-collar offences. IN: DELMAS-MARTY. What kind of criminal policy for Europe ? The Hague: Kluwer Law International, 1996. (Delmas-Marty: 1996), p 90.

¹³ "The use of women in international prostitution and trafficking networks has become a major focus of international organized crime.", Beijing Declaration and Platform for Action of the Fourth World Conference on Women, China, Objective D, quoted in (96) COM 567 final page 36. See also Savona, supra, note 12, points 3.1, 3.4, 4. SCHMID, Alex P. (ed.). Migration and Crime. Proceedings of the International Conference on 'Migration and Crime. Global and Regional Problems and Responses. Milan: ISPAC, 1998. p 165.

¹⁴ "The economic approach to forced prostitution indicates that, because of the profit margins at stake and the large number of beneficiaries involved, it will not wither away. Rather, its existence must be actively

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2. The second part of the document is a list of the topics that were discussed at the meeting. The topics are listed in alphabetical order.

3. The third part of the document is a list of the actions that were taken at the meeting. The actions are listed in alphabetical order.

4. The fourth part of the document is a list of the decisions that were made at the meeting. The decisions are listed in alphabetical order.

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6. The sixth part of the document is a list of the conclusions that were reached at the meeting. The conclusions are listed in alphabetical order.

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9. The ninth part of the document is a list of the persons who were responsible for the decisions made at the meeting. The persons are listed in alphabetical order.

10. The tenth part of the document is a list of the persons who were responsible for the recommendations made at the meeting. The persons are listed in alphabetical order.

11. The eleventh part of the document is a list of the persons who were responsible for the conclusions reached at the meeting. The persons are listed in alphabetical order.

12. The twelfth part of the document is a list of the persons who were responsible for the next steps that will be taken. The persons are listed in alphabetical order.

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15. The fifteenth part of the document is a list of the persons who were responsible for the recommendations made at the meeting. The persons are listed in alphabetical order.

has resulted in an increased demand for foreign prostitutes in the European Union and that consequently the Union is faced with the problem of trafficking in women.¹⁵

1.2 The Problem Stated.

The reasons why trafficking occurs are diverse and are a combination of the factors mentioned above; women's desire to migrate, limited migration prospects in western Europe, organised crime interests, the dynamic of the sex industry, etc. In this context the adoption by states of an 'anti-trafficking statute', as is being proposed in this paper, must be seen as part of an overall solution and not a solution in itself. Indeed, many of the factors behind trafficking are unsuited to repressive measures and require positive initiatives by society.

Trafficking of women is an international problem, often involving trans-national organised crime syndicates, the commission of different elements of crimes in different jurisdictions and the movement of victims across borders. Yet crime is, for the most part, tackled at national level.

Tackling trafficking successfully requires inter-state cooperation, but there are certain obstacles to efficient repression of trafficking in women. One is a definitional one – there is no agreement on what exactly should be considered as trafficking. Naturally it is difficult for states to cooperate with each other if the subject matter of the cooperation is unclear or unknown. Two main reasons for this are (1) the difficulty in distinguishing trafficking of women from migrant trafficking generally and (2) different approaches to prostitution in different countries add to this disharmony. Thus a victim of trafficking in one country may be a (legal) immigrant worker in the next.

assailed by addressing the supply as well as the demand side." DEMLEITNER, Nora V. *Forced Prostitution: naming an international offense*. 18 *Fordham Int'l L.J.* 163, at pp 190-191.

¹⁵ It follows that the demand side of the market is not particularly concerned with the plight of those unfortunate enough to be on the supply side of the equation.

Of course, this is not the only reason why trafficking has not been combated successfully. Many countries do not have laws which address trafficking in women and consequently this issue has not been a focus of law enforcement. Where instances are discovered, too often the authorities view prostitution, organised crime and trafficking victims all as part of the same problem. That this is so despite the fact that international agreements for the suppression of trafficking have been in existence since the beginning of this century allows one to wonder of what use these agreements are in practice. Although newer initiatives at EU level give reason to believe that a different approach is possible, the international law on trafficking must be seen as set of instruments which are not working.

In this context, the abolition of internal borders within the EU and the notion of a common external border mean that tackling the traffic of persons will be a major priority for the European Union.¹⁶ But is the EU the correct body to take action ? Given that the Member States of the EU are, generally, not the countries of origin of victims of trafficking it must be asked whether action at a level which would include all countries involved would be more appropriate. Even if this is not the case, the EU has never addressed an issue such as this before, how could it proceed ?

The following sections in this chapter will examine some of the attempts made to find an agreed definition of trafficking in women. Although a somewhat tedious exercise, it is hoped to demonstrate the common elements which are generally agreed and the points which are proving to be more difficult, and which consequently are contributing to the problem of addressing trafficking effectively. It will be seen that the different approaches have many similarities.

One of the main obstacles to reaching agreement on what is to be done concerns the issue of prostitution. The point here is once again what should the subject matter of an initiative to counter trafficking be ? Some believe that an instrument which addresses all

¹⁶ See European Commission: "Towards an Area of Freedom, Security and Justice", COM (1998) 459 final, page 6.

forms of sexual exploitation, or indeed all forms of exploitation, is best. Others believe that an initiative which deals specifically with trafficking should focus on forced prostitution, perhaps the most common manifestation of trafficking. Both arguments are persuasive and, further, both are supported by Member States of the EU. The basis of these different approaches will be examined and, given these different approaches, some tentative proposals on how to proceed will be offered.

The final section of this chapter will discuss the initiatives taken to date to combat the traffic in women. Of particular interest will be the 1949 Convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others¹⁷ which is the most recent instrument on trafficking and which represented a major departure, in certain respects, from the method of its predecessors. While outside the focus of the present paper, some other international procedures and instruments of relevance to the problem of trafficking in women will also be discussed.

1.3 Defining Trafficking.

In a report prepared for the Budapest Group the challenge presented by trafficking in women was stated clearly:¹⁸

“The benefits involved for smugglers are so high that aliens smuggling is unlikely to stop unless further harmonisation efforts in this field are made. In this respect, discrepancies in legal definitions and penalties in participating States, as outlined in the above paragraphs, are hindering an efficient common approach to the problem. It is therefore worth to stress the importance of arriving to a common definition on the subject and agree on a common legal statute.” (Sic)

¹⁷ 96 U.N.T.S. 271.

¹⁸ BUDAPEST GROUP. Anti-trafficking model legislation. Report of the working group of the Budapest Group prepared by Belgium and Poland with the technical support of IGC for the meeting of the expert group of the Budapest Group, Ljubljana, 13-14 June 1996.



There is no consensus on what is meant by the term "trafficking in women". While expounding legal definitions may seem like an exercise in semantics, in the present case there is a certain necessity that all parties involved in the fight against trafficking are agreed on what it is exactly that they are tackling: "Without a clear understanding and definition of what it is that constitutes trafficking in women, it is not possible to develop a strong legal basis for the prosecution of traffickers, nor to combat trafficking effectively"¹⁹. Thus governments must decide what it is that they want to combat.

European Parliament has called "on the Commission to cooperate with the Member States in drawing up a definition of the offence [of trafficking in human beings] so that fighting this crime can be tackled within the Union on a basis of sound cooperation and without any confusion over terms"²⁰

One difficulty lies in making the distinction between trafficking of women and other forms of trafficking in human beings. Many people, both men and women, are trafficked every day, as it becomes more difficult to migrate legally into richer countries. But while the trafficking of women is to be seen as part of the wider trafficking of migrants, there are some key differences.

The term 'trafficking in women' gives the first clue of what is involved, the connotation being that it is goods or commodities that are being dealt in rather than the movement 'of' people. Trafficking in women developed as a concept at the turn of the century and was known as 'the white slave traffic' and the analogy of slavery would seem to be just as fitting today.²¹ Several international treaties were concluded with the aim of putting an end to the practice of trafficking women in order to force them into prostitution. Thus the involuntary nature of the trafficking was seen to be a relevant factor.

¹⁹ IOM: 1995, op cit., p 6.

²⁰ Resolution on trafficking in human beings, point 22. [1996] OJ C 32/88.

²¹ "...female sexual slavery is not an illusive condition; the word "slavery" is not merely rhetorical. Slavery is an objective social condition that requires escape in order for the victim to get out of it.", BARRY, Kathleen. Pimping: the world's oldest profession. p 1.[<http://www.echonyc.com/~onissues/pimping.htm>] (04/13/99)

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As was seen in the previous section, some advocate that the focus of anti-trafficking measures should be forced prostitution, although there is a consensus that sexual exploitation more generally should be tackled.²² In addition, there are many different ways by which a woman can find herself a victim of trafficking as the trafficking of women does not adhere to any standard formula. At the Vienna conference on trafficking, the working group on judicial co-operation concluded that the focus of the criminal law should be the sexual exploitation of the vulnerable situation of foreign women and that the level of consent of the victim and although trafficking in women involves a cross-frontier element, the means of entering the territory of the country of destination were of little relevance.²³

That the purpose of trafficking in women should be the focus of countermeasures was echoed by the UN in General Assembly Resolution 49/166 which defines trafficking in women or girls as “the end goal of forcing women and girl children into sexually or economically oppressive and exploitative situations” and the fact that it is done “for the profit of recruiters, traffickers and crime syndicates.”

Arriving at an agreed definition of trafficking in women has proved elusive. However, agreement on the constituent elements of trafficking should at least be possible. At this point it may be useful to consider some of the attempts made at arriving at a definition. There are various interpretations by international organisations concerned with trafficking in women as to what exactly is meant by this term. Some of these will now be examined after which will follow a summary of the main findings of this analysis.

²² COUNCIL OF EUROPE. Traffic in women and forced prostitution in Council of Europe member States. (CM/DeI/Dec(97)592/3.1) Appendix 1. “The definition of the phenomenon of trafficking in human beings is one of the major difficulties this subject raises and the CDEG welcomes the intentions of the Assembly in this area where the Assembly aims to promote a wide definition in order to encompass all cases of use of force and exploitation.....[However] such detailed mention of the use of force, might allow a limited interpretation..[which].. therefore risks creating limits when interpreting the definition..”

²³ EUROPEAN COMMISSION. Report of the Conference on Trafficking in Women. Vienna 10-11 June 1996. p52.

1.3.1 The Definitions

(a) The 1949 Convention.

The 1949 Convention for the suppression of the traffic in persons and of the exploitation of the prostitution of others does not contain a definition of trafficking in itself. Article 1 of the Convention, however, outlines what it is designed to combat, namely the States Parties agreed “to punish any person who, to gratify the passions of another: 1. Procures, entices or leads away, for the purposes of prostitution, another person, even with the consent of that person; 2. Exploits the prostitution of another person, even with the consent of that person.”

As the Convention is against both trafficking and pimping in general, the necessity of determining the level of coercion used against a victim is avoided, the consent of the victim being irrelevant. It is also significant that the crossing of a border is not necessary in order for an offence to be committed and thus there is one less element to be proved when prosecuting offenders. Conversely, by also addressing domestic prostitution, the Convention intrudes upon the sovereignty of states which are parties to it.

(b) United Nations draft Protocol – option one.²⁴

The current draft of the Protocol to prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime has two possible definitions. The first of these is as follows;

“2. For the purposes of this Protocol, “trafficking in persons” means the recruitment, transportation, transfer, harbouring or receipt of persons, either by the threat of kidnapping, force, fraud, deception or coercion, or by the giving or receiving of unlawful

²⁴ The current version (September 1999) of the Revised draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. United Nations General Assembly A/AC.25/4/4/Add.3/Rev.2.

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payments or benefits to achieve the consent of a person having control over another person, for the purpose of sexual exploitation or forced labour.”

Point 3 of this draft article goes on to state that the above applies to children regardless of whether they have consented.²⁵

This definition represents a move away from the 1949 Convention where the consent of adult victims was also deemed to be immaterial, as some form of coercion or deception in order to achieve the consent of the victim is required. It will be noted, however, that there is no requirement that a border be crossed. Further, despite the inclusion of coercive elements in the definition, it is not limited to forced prostitution, but addresses sexual exploitation and forced labour more generally.

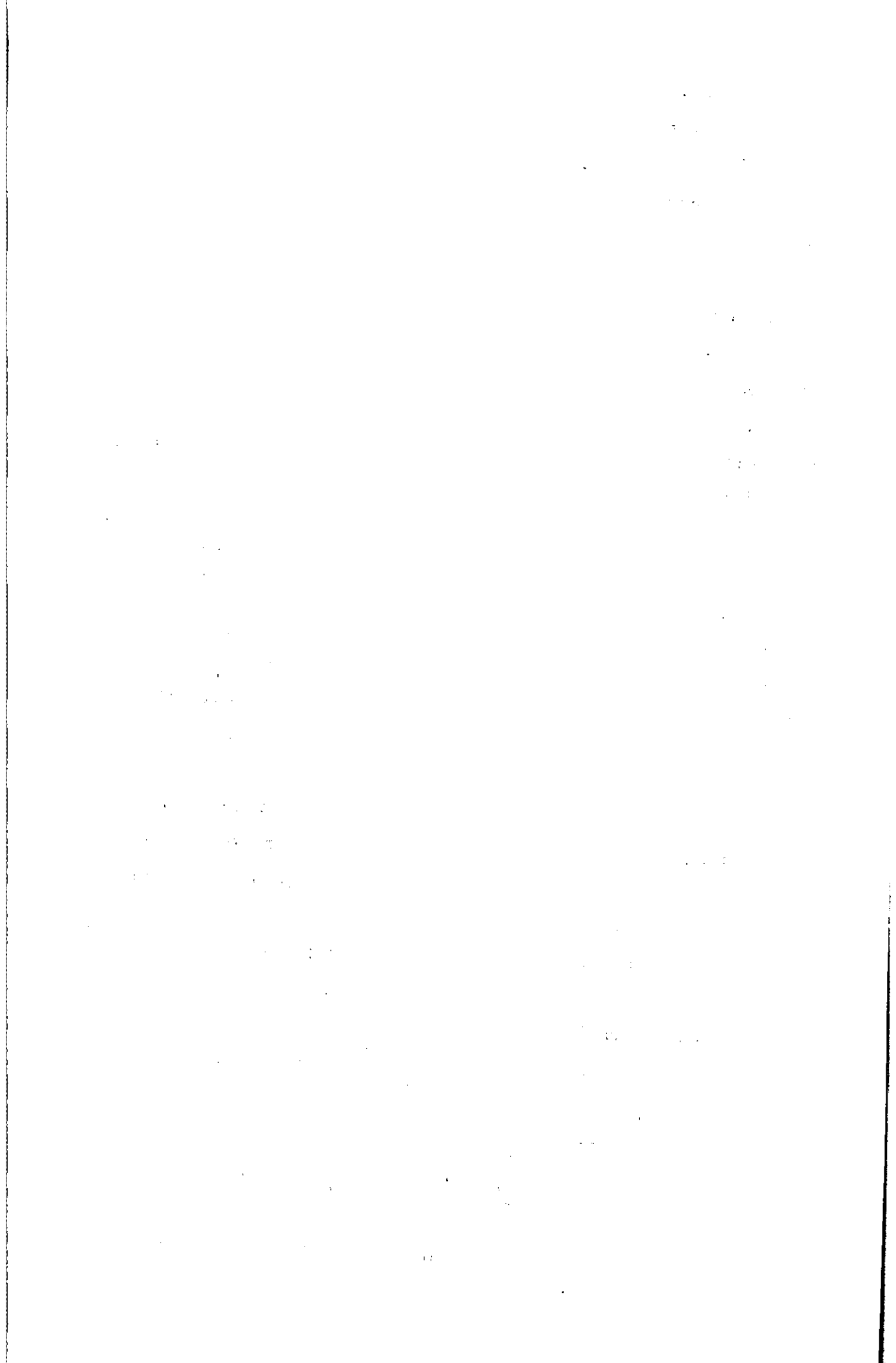
(c) United Nations draft Protocol – option two.

The alternative to the above definition reads;

- “(c) “Trafficking in women” shall mean any act carried out or to be carried out for an illicit purpose or aim by a criminal organization [...] that involves:
- (i) Promoting, facilitating or coordinating the kidnapping, holding or hiding of a woman, with or without her consent, for illicit purposes or in order to force her to perform, not perform or tolerate an act or to subject her unlawfully to the power of another person;
 - (ii) Transporting a woman or facilitating her entry into another state;

And “illicit purpose or aim” shall mean:

²⁵ This would seem to be the preferred option currently – see Revised Draft Protocol footnote 20. The UN High Commissioner for Human Rights also favours this option: see UN General Assembly document A/AC.254/16, 1 June 1999, point 12. (UN2)



“(d)(iii) The prostitution or other form of sexual exploitation of a woman or child, even with the consent of that person.”

This option specifies that the trafficker must be a ‘criminal organisation’ although it is felt that not much turns on this as in practice traffickers could not be just one person acting alone. The consent of the victim is deemed to be irrelevant although, strangely, the use of force is then mentioned, thereby making this definition somewhat confusing. The necessity to cross an international border is clearly stressed.

(d) The European Commission.

The first Communication by the European Commission on trafficking in women defines trafficking “as the transport of women from third countries into the European Union (including perhaps subsequent movements between Member States) for the purpose of sexual exploitation” and “covers women who have suffered intimidation and/or violence through the trafficking. Initial consent may not be relevant, as some enter the trafficking chain knowing they will work as prostitutes, but who are then deprived of their basic human rights, in conditions which are akin to slavery. The Communication does not however seek to address the question of women who are not put under duress by a third party to travel to work as prostitutes over borders, nor does it address the questions of black market labour in other sectors in the European Union.”²⁶

This definition is focused on the trafficking of women into the EU. The trafficking of European Union citizens is excluded. The question of the initial consent of the victim is deemed irrelevant as the end purpose of keeping women in slave-like conditions is seen as more important. While not limited to forced prostitution, it is stressed that ‘unforced’ prostitution is not within its ambit, nor is the exploitation of migrants more generally.

²⁶ COM (96) 567 final p 4.

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(e) The Europol Convention.

The European Union has adopted two perspectives on trafficking. Firstly, the Europol Convention stipulates that “ ‘traffic in human beings’ means subjugation of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue especially with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children. These forms of exploitation also include the production, sale or distribution of child-pornography material.”²⁷

This version requires coercion of some form but uses the general term ‘sexual exploitation’. There is no trans-border requirement.

(f) EU Joint Action on trafficking and the sexual exploitation of children.

Secondly the EU Joint Action²⁸ concerning action to combat trafficking in human beings and the sexual exploitation of children gives the following, more technocratic, definition:

“Title I

A. For the guidance of Member States.....and without prejudice to more specific definitions in the Member States’ legislation, the following concepts are understood...

- (i) ‘trafficking’, as any behaviour which facilitates the entry into, transit through, residence in or exit from the territory of a Member State, for the purposes set out in point B(b) and (d)
- (ii) ‘sexual exploitation’ in relation to an adult, as at least the exploitative use of the adult in prostitution.

B(a) Sexually exploiting a person other than a child for gainful purposes, where:

²⁷ Europol Convention, [1995] OJ C316/1 as amended by Council Decision of 3 December 1998 supplementing the definition of the form of crime ‘traffic in human beings’ in the Annex to the Europol Convention, [1999] OJ C26/21.

²⁸ Joint action of 24 February adopted by the Council on the basis of Article K.3 of the Treaty on European Union concerning action to combat trafficking in human beings and sexual exploitation of children, [1997] OJ L63/2.

- use is made of coercion, in particular violence or threats, or
 - deceit is used, or
 - there is an abuse of authority or other pressure, which is such that the person has no real and acceptable choice but to submit to the pressure or abuse involved;
- (b) trafficking in persons other than children for gainful purposes with a view to their sexual exploitation under the conditions set out in paragraph (a);....
- (d) trafficking in children with a view to their sexual exploitation or abuse.”

This version is intended to be of guidance to the Member States in the implementation of the joint action, which requires, as will be seen in chapter two, Member States to amend their criminal laws if they are not compatible with the joint action. The definition requires that the territory of a Member State be concerned, although the facilitation of residence will count as trafficking. There is no trans-border requirement, therefore. The term ‘sexual exploitation’ is left very vague²⁹ but it includes, at least, forced prostitution for ‘gainful purposes’.

(g) Parliamentary Assembly of the Council of Europe Recommendation 1325 (1997).

“2. The Assembly defines traffic in women and forced prostitution as any legal or illegal transporting of women and/or trade in them, with or without their initial consent, for economic gain, with the purpose of subsequent forced prostitution, forced marriage, or other forms of forced sexual exploitation. The use of force may be physical, sexual and/or psychological, and includes intimidation, rape, abuse of authority or a situation of dependence.”

This definition is of interest because of its detailed provisions on what constitutes the use of force.

²⁹ The Commission explains that the term “exploitation” is used to describe a situation which generally involves a third party who makes a profit either financial or in kind. Communication from the Commission on violence against children, young persons and women (DAPHNE), COM (98), p 5, note 3.

1.3.2 What is involved in trafficking in women ?

Hirsch³⁰ has identified certain constant factors regarding the trafficking of women. The trafficking of women for sexual exploitation must necessarily involve two elements: a trafficking element and some form of sexual exploitation. She notes that women's desire to move to a more prosperous country is exploited, that women are pressurised, deceived or given false hopes and that women leave their countries and are victims of sexual exploitation as a result of their dependant situation. She concludes that dependence and exploitation are the two major concerns.

(a) A cross border element ?

Of the seven definitions quoted above, five did not require a cross-border element in order to deem trafficking to have occurred. At first sight, it is the cross-border element of trafficking which brings this issue into the international arena. Thus the EC may have competence to address trafficking if we can define it as a migration issue.³¹ Nevertheless this is no basis for excluding cases of trafficking where a border is not crossed. Just because there is no international element does not mean that states should not treat every case of trafficking equally seriously.

(b) Sexual exploitation – consent of the victim.

Clearly there is an unwillingness to accept the position of the 1949 Convention as the definitive one as far as trafficking in women is concerned, as the inclusion of domestic prostitution was, perhaps a step too far for some states. In support of this view, Chuang states that the inability of the Convention to provide effective protection attests to the need for a reconceptualization of the trafficking problem.³²

³⁰ Hirsch, op cit., p 10

³¹ This is discussed further in chapter two, infra.

³² Chuang, loc. cit., p 106.

Some are in favour of using a broad term that would then encompass various forms of exploitation. An example of such an approach can be seen in the approach of the United Nations High Commissioner for Human Rights to the draft Protocol supplementing the United Nations Convention against Transnational Organized Crime referred to above. The Commissioner believes that;

“ A broad and inclusive definition is vital to ensuring the present and continuing relevance of this instrument.[...] While the draft definition does recognize that trafficking takes place for reasons beyond forced prostitution...it limits other purposes of trafficking to “forced labour”. A preferable and more accurate description of purposes would include reference to forced labour and/or bonded labour and/or servitude. (The term “servitude”, when used in this context, should be understood to include practices such as... forced prostitution.)”³³

The danger with this approach is that one ends up with a definition that is not specific as it covers too many diverse situations. Two points may be made at this juncture. Firstly the purpose of an instrument which deals specifically with sexual exploitation is to highlight and differentiate the trafficking in women for this purpose from migrant trafficking in general. Secondly, as issues such as servitude and slavery are already covered by international law, a new instrument using wide definitions such as these to combat trafficking should be superfluous if this approach actually worked.

On the other hand, there are difficulties with a focused approach such as that of ‘forced prostitution’³⁴ for the reasons discussed above and not least because women may also be trafficked for forms of sexual exploitation other than prostitution, such as to be sold as wives or used in sex shows and the like. In addition the term “forced prostitution” may not be compatible with present legislation in certain European countries.³⁵

³³ UN2, op cit., point 12.

³⁴ This is discussed further in the context on prostitution, *infra*.

³⁵ Committee of Ministers of the Council of Europe, decision on Parliamentary Assembly Recommendation 1325 (1997) (CM/Del/Dec(97)592/3.1) Appendix 1.

This brings us to the notion of 'sexual exploitation'. In support of her argument quoted above, the High Commissioner for Human Rights went on to say that (a reference to servitude) "would also serve to avoid the implementation difficulties inherently associated with undefined, imprecise and emotive terms such as "sexual exploitation".³⁶ It is difficult to disagree with this sentiment, as it is tempting to view the notion of 'sexual exploitation' as a fudge that would allow states to tailor the term to their domestic situations. Viewed in this way, the use of the term 'sexual exploitation' would not bring about a common definition of trafficking in women.

Gramegna put it as follows: "Sexual exploitation does not refer only to prostitution, but can cover a range of activities [...] where in practice, women often find themselves placed in sexually slave-like conditions"³⁷. While not exactly a precise definition this does include prostitution and allows a common interpretation of 'slave-like conditions' to be arrived at by co-operating national bodies by reference to international law.

The prospect of arriving at an agreed definition among the 15 is more likely if forced prostitution is seen as a minimum standard. In practical terms this translates into a definition which uses the term 'sexual exploitation'. This is in keeping with the current approaches, as it will be noted that none of the definitions cited above limited themselves to forced prostitution. Whether the level of coercion used against the victim should also be considered a relevant factor is another issue which will be discussed further in the context of prostitution.

1.4 Prostitution.

The debate as to whether prostitution is to tolerated and regulated or regarded as unacceptable has a long genealogy³⁸ and it will not be attempted to resolve this debate in the current paper. Nevertheless, the debate is a central one for the issue of trafficking in

³⁶ UN2, op cit.

³⁷ GRAMENGA, Marco. Statement made at the EU Conference on trafficking in women for sexual exploitation, Vienna 10-11 June, 1996. p 25.

women for sexual exploitation, as one of the main forms of exploitation is prostitution. The questions of how the different approaches to prostitution affect trafficking in women and the responses by states to this activity are, therefore, relevant.

1.4.1 Abolition or Regulation ?

In Europe, there are two main schools of thought on how prostitution should be dealt with.³⁹ Regulationists see prostitution as inevitable and believe that it should be regulated by the state, in order to prevent abuses and to protect both the prostitutes and customers alike. Abolitionists, on the other hand, believe that the regulation of prostitution should be abolished (hence the name), as legalisation of prostitution would legitimise abuse, and that acts related to the organisation of prostitution should be criminalised.

In the context of trafficking in women both schools of thought believe that their approach would be the correct one in an anti-trafficking strategy.

The regulationists view the sex industry as a legitimate commercial sector and prostitution as work which should be regulated as any other sector of the economy. By regulating prostitution, the abuses can be brought to an end⁴⁰. In this regard it must be noted that women in regulated brothels in Nevada, USA, work in safer conditions and with little or no involvement of organised crime.⁴¹

If it were the case that regulation of prostitution would put abuses, such as trafficking, to an end then it would seem to be the most appropriate option. The evidence suggests otherwise, however.⁴²

³⁸ For an account of the oscillations between the various approaches to prostitution in Germany over time see: VON GALEN, Margarete. Prostitution and the Law in Germany. 3 *Cardozo Women's L.J.* 349.

³⁹ The criminalisation of prostitution will not be considered.

⁴⁰ See SHRAGE, Laurie. Prostitution and the case for Decriminalisation. *Dissent*, Spring 1996, Vol. 43, No. 2.

⁴¹ DREXLER, Jessica N. Governments' Role in Turning Tricks: the world's oldest profession in the Netherlands and the United States. 15 *Dick. J. Int'l L.* 201, p 230.

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It would seem that only a small percentage of prostitution takes place in regulated settings and that the involvement of organised crime in prostitution generally is rampant and is not going away. Further, women prefer not to work in state regulated brothels for a variety of reasons⁴³. Lastly, it is generally the poorer, immigrant women (i.e. the victims of trafficking) who are prostituted in the more clandestine ways. Regulation, therefore, would do nothing for these victims except, perhaps, drive them further into the underworld.

Abolitionists see prostitution as per se exploitation of women which would be given a certain amount of legitimisation if it were regulated.⁴⁴ In addition, the existence of legitimised prostitution creates a market for ever more prostitutes and therefore a demand for trafficked prostitutes.⁴⁵ It is no coincidence that the Member States with the most lenient attitudes to brothels, the Netherlands, Germany and Denmark, may have some of the highest instances of trafficked women.⁴⁶ "The fact is that organised prostitution is the economic and structural foundation of sex trafficking"⁴⁷

That there is a link between regulated prostitution and increased prostitution and trafficking seems to be certain.⁴⁸ There are flaws in the abolitionist argument, however.

⁴² "there has never been any society where regulated prostitution has worked" Ibid. p 210, quoting Winick in 'Taking Sides: Clashing Views on Controversial Issues in Human Sexuality'.

⁴³ See LOPEZ-JONES, Nina. Legalising Brothels. *New Law Journal*, 1 May 1992, p 594 at p 595: only 12% of prostituted women work in the legalised area of Hamburg. Demleitner, loc. cit., refers at p 174 to studies done by the League of Nations which indicate that the regulation of prostitution makes it more difficult for a woman to leave prostitution.

⁴⁴ Leidholdt makes the point that legitimating prostitution as sex work sends out the message that it is acceptable to purchase a woman's body – that it is a marketable commodity and that, secondly, that when prostitution is accepted by society as sex work, it becomes more difficult for poor women to resist economic and familial pressures to enter prostitution: LEIDHOLDT, Dorchon. Prostitution: a contemporary form of slavery. Geneva: UN Working Group on Contemporary Forms of Slavery, May 1998, pp 6-7. Another point to be made is that the EU is not alone in its experience of trafficking and prostitution, as this is a worldwide phenomenon. For the EU to recognise prostitution as 'sex work' would send a signal to poorer regions that prostitution is a suitable form of employment for women – surely not the message the EU wants to put out at the start of the third millennium.

⁴⁵ Schmid, op cit. p 324. Also if prostitution is viewed as an acceptable activity rather than an illegal one then men who might not otherwise use prostitutes may do so.

⁴⁶ See IOM: 1996, op cit., p 8.

⁴⁷ Leidholdt, op cit., p3.

⁴⁸ In the 1920's the League of Nations commissioned a body of experts to examine trafficking. They determined that "the existence of licensed houses is undoubtedly an incentive to traffic, both national and

1. The first part of the document is a list of the names of the persons who were present at the meeting. The names are listed in alphabetical order.

2. The second part of the document is a list of the topics that were discussed at the meeting. The topics are listed in alphabetical order.

3. The third part of the document is a list of the actions that were taken at the meeting. The actions are listed in alphabetical order.

4. The fourth part of the document is a list of the dates when the actions were completed. The dates are listed in alphabetical order.

5. The fifth part of the document is a list of the names of the persons who were responsible for the actions. The names are listed in alphabetical order.

6. The sixth part of the document is a list of the names of the persons who were present at the meeting. The names are listed in alphabetical order.

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The argument that although prostitution is a personal choice all activities which surround it should be punished is somewhat ambiguous⁴⁹. Moreover as prostitution will certainly not disappear soon, the conditions of prostitutes might well be improved if there was some control over the activity. In the context of trafficking it must be noted that the authorities in the Member States of the EU make little effort to prosecute offences related to prostitution and, although this could probably be remedied if the political will to do so existed, even in the USA where consistent attempts are made to prosecute such offences, prostitution continues.

It is submitted that the choice of whether prostitution should be regulated or combated should not and would not be based on the possible impact on victims of trafficking alone. The central question for any society is whether prostitution is an acceptable activity or not, for if it is not then it will be politically impossible to regulate it. This would seem to be the situation in most Member States of the EU with the exception of the Netherlands, Denmark and (possibly) Germany.⁵⁰

1.4.2 The 'forced' prostitution distinction.

The relevance of the debate on prostitution becomes clearer when we turn to the subject matter of anti-trafficking instruments and, more specifically, what the purpose of such an instrument should be. The 1949 Convention clearly states that it seeks the suppression of the trafficking in persons and of the exploitation of the prostitution of others as prostitution is considered to be 'incompatible with the dignity and worth of the human

international." Demleitner, loc. cit. p 171, quoting UN Dept. of Int'l Economic and Social Affairs, Study on Traffic in Persons and Prostitution, 1959.

⁴⁹ Hirsch, op cit., p 20.

⁵⁰ The Dutch government is of the opinion that a person has the right to chose to be a prostitute – see Human rights questions. Position of the Netherlands government, United Nations Economic and Social Committee (E/1990/33) 3 April 1990, cited IN: LOUIS, Marie-Victoire. Legalising pimping, Dutch style. The Body Shop. *Le Monde Diplomatique*, 8 March 1997. Denmark has recently passed legislation favouring the right to 'work' as a prostitute. Prostitution is tolerated in Germany in 'Eros-centers' in certain zones in cities and are required to pay income-tax – see Von Galen, loc cit., section III. In contrast, Sweden recently passed a law to criminalise the clients of prostitutes, but not the prostitutes themselves. (Law (1998: 408) on prohibiting sexual services for payment – Lag om förbud mot köp av sexuella tjänster). France is also active in pursuing its abolitionist stance, particularly at national level.

person'⁵¹. The objective of this instrument, therefore, is to eradicate prostitution as well as trafficking. Under this approach trafficking for prostitution is outlawed regardless of the consent or otherwise of the trafficked person.

A debate has emerged, however, on whether the offence of trafficking in women should refer specifically to 'forced prostitution', with 'unforced' prostitution remaining outside its ambit.

Those who view prostitution as 'work' are in favour of the focus on forced prostitution.⁵² They do not see the bringing of women from poor countries to richer ones in order to be prostituted as a problem in itself, believing that action should be focused on cases where women have not voluntarily travelled with the intention of being a prostitute.⁵³

There are also other supporters of the forced prostitution distinction.

Demleitner argues a strong case for naming an international offence of forced prostitution. She notes that "...in concentrating on the trafficking aspect, none of the international conventions adopted directly dealt with the issue of forced prostitution, which underlies the question of trafficking"⁵⁴ and that the reference in the 1949 Convention of the exploitation of prostitution is weaker than the term 'forced prostitution'. She goes on to say that "the number of possible labels that can be attached

⁵¹ Preamble to the 1949 Convention.

⁵² The Netherlands has expanded its definition of trafficking to cover the use of violence, or the threat of violence to coerce a woman into prostitution. CALDWELL, Gillian. Trafficking Women from the former Soviet Union. *The Forced Migration Monitor*, September 1997, No. 19, p7.

⁵³ But why would the immigration of prostitutes from outside the Union be a good thing ? Even if prostitution is regulated in a MS this does not stop it disallowing the trafficking of prostitutes, even with their consent. The Mann Act in the USA (discussed in chapter three) is an example of such an approach. Women who prostitute themselves generally do so as they have no better economic alternative. The argument that as their clients are usually from western Europe anyway foreign prostitutes might as well earn more money in the EU than in their own countries is hardly the best approach to resolving the economic inequalities in these countries. That the Member State most in favour of the 'forced prostitution' distinction is the Netherlands, which also has a very powerful sex industry, begs the question of whose interests are really being served. It has been noted that prostitution pre-exists as a system which requires a constant supply of women regardless of how they get in to prostitution. COALITION AGAINST TRAFFICKING IN WOMEN. Sex: from intimacy to "sexual labour" or Is it a human right to prostitute ? (<http://www.uri.edu/artsci/wms/hughes/catw/sex.htm>) (13 April 99).

to forced prostitution contribute to the lack of a clear enforcement focus”⁵⁵ She proposes that forced prostitution be called a violation of international norms rather than be regarded as another category, such as slavery.⁵⁶

She considers, however, that ‘forced prostitution’ could indeed be given quite a wide interpretation in order to protect as many women as possible in prostitution⁵⁷ and concludes that the difficulty in prosecuting trafficking offences is due to the unwillingness to recognise forced prostitution as an offence in its own right. If all of the elements which make up the crime of forced prostitution were treated as a composite crime and labelled as ‘forced prostitution’ she believes that it would be easier to prosecute all of those involved (including customers) at the domestic level.⁵⁸

It should be said that by its very nature trafficking typically involves some amount of force, coercion or deception. Thus if prostitution is to be tolerated or regulated, it makes sense to distinguish trafficking by referring to these characteristics as all migrant prostitutes are not to be seen as victims of trafficking.⁵⁹

The arguments against making the distinction between ‘forced’ and ‘unforced’ prostitution are also persuasive. The advocates of this argument would point out that the reality of prostitution is that the choice to prostitute oneself is almost always the result of coercive circumstances.⁶⁰ The distinction between forced and unforced prostitution merely serves to legitimate the latter where the operation of those profiting from prostitution, pimps, brothel keepers and the like is regarded as acceptable, thus ignoring

⁵⁴Demleitner, loc. cit. p165, quoting UN Dep’t of Int’l Economic and Social Affairs, Study on Traffic in Persons and Prostitution at 1-2, UN Doc. ST/SOA/SD/8

⁵⁵ Ibid. page 191.

⁵⁶ Ibid. page 193.

⁵⁷ Ibid. pp 187-188.

⁵⁸ Ibid. p 197. As no international enforcement body exists at this point.

⁵⁹ IOM: 1996, op cit., p 3.

⁶⁰ Demleitner, op cit., p 188: “even when prostitution seems to have been chosen freely, it is actually the result of coercion” whether it be due to economics, an insufferable family situation, rape, or the seduction or violent “persuasion” of a procurer (citing Report of UN Dept. of Int’l Economic and Social Affairs, Activities for the Advancement of Women: Equality, Development and peace, UN Doc. ST/ESA/174 (1985)).

the true nature of the relationship between these people and the prostitutes, who are their victims.⁶¹

Another point to be made that a definition focusing on forced prostitution would not cover other forms of exploitation, particularly sexual exploitation, suffered by trafficked women.⁶² Although the concept of 'forced sexual exploitation' could be used to deal with this problem.

The use of the 'forced prostitution' distinction would also make it very difficult to obtain convictions for trafficking. While Demleitner's argument is correct, i.e. that the lack of enforcement focus is due in part to unspecific definitions of trafficking, it must be asked how is it to be proved that a trafficked woman has been forced into prostitution? Unless the trafficking of women for 'voluntary' prostitution is to be regarded as acceptable, the 'forced prostitution' distinction would seem to introduce an unnecessary weakness into anti-trafficking efforts. By defining 'trafficking for prostitution' broadly, the burden of proof required to successfully convict a trafficker is lower. Proving that a woman has been brought into a Member State to be prostituted would no doubt be easier than proving that acts of coercion, which may not even have happened in the same country, were used against her.

Unless prostitution by non-EU nationals within the Union is something which society deems worthy of preserving, a broad approach to trafficking might indeed be very useful in curbing this activity. A (rebuttable) presumption by the law that any non-EU citizen who is 'working' as a prostitute has been trafficked would be a powerful weapon against the traffickers.

⁶¹ See Leidholdt, op cit., p 5

⁶² CHUANG, Janie. Redirecting the Debate over Trafficking in Women: definitions, paradigms and contexts. *Harvard Human Rights Journal*, Vol. 11, Spring 1998, p 73.

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1.4.3 Discussion.

The debate on prostitution and the notion of 'forced' prostitution continues and the Member States of the Union are not agreed on which approach is best. Certainly those states which favour the regulation of prostitution are very much in the minority at the moment but are determined to argue in favour of their view.⁶³

The Council of Europe Group of Specialists on action against traffic in women and forced prostitution could not reach agreement on the concept of 'forced' in 'forced prostitution'.⁶⁴ The consensus within the workshop on judicial cooperation to consider trafficking in women, organised by the European Commission, was not in favour of limiting efforts to 'forced' prostitution only, and regarded the consent of the victim of little relevance, the crucial point being the sexual exploitation (not limited to prostitution) of foreign women.⁶⁵

Trafficking in women for sexual exploitation and prostitution must be seen as two sides of the same coin. It is difficult to see the approach of 'recognising' prostitution as a solution to trafficking, therefore. The Member States of the EU which to tackle the sexual exploitation of women more generally (including 'unforced' prostitution) should not be tempted to bring the sex industry into the mainstream economy as this could be a counterproductive move. On the other hand, agreeing to an imprecise concept such as 'sexual exploitation' which is itself not defined may be the only way for the 15 to present a united front against the traffickers. A minimum standard of 'forced prostitution' would allow Member States who wished to apply stricter rules to do so. The danger of this tactic

⁶³ See Louis, loc cit. It should be noted that interviews conducted in the course of researching the present paper revealed that many people involved in the fight against trafficking, both in official and NGO circles, regard the Dutch position as disingenuous and unhelpful. See, for an example of this, MARCOVICH, Malka and MCGOWAN, Meredith. Political report on action against traffic in human beings for the purpose of sexual exploitation: the role of NGOs, Conference organised by the Steering Committee for Equality between Women and Men (CDEG), Council of Europe, 29-30 June, 1998. [<http://www.uri.edu/artsci/wms/hughes/catw/ngocoe>] (6th August 1998).

⁶⁴ COUNCIL OF EUROPE. Final report of the Group of Specialists on action against traffic in women and forced prostitution. Strasbourg, Council of Europe, 11 May 1994. CDEG (94) 31, point 8

⁶⁵ EUROPEAN COMMISSION. Report of the Conference on Trafficking in Women. Vienna 10-11 June 1996. p52.

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is that the EU could find itself with 15 different standards. The EC and TEU treaties provide for closer cooperation between a majority of Member States where all 15 are not prepared to move together. This will be discussed in chapter two.

1.5 The United Nations Instruments and Mechanisms.

1.5.1 The 1949 Convention.

The purpose of the 1949 Convention is to consolidate the different texts dealing with trafficking and forced prostitution which preceded it⁶⁶ and to supersede these as far as the signatories to the 1949 Convention are concerned.⁶⁷ The somewhat chaotic result has been that only eight⁶⁸ of the fifteen EU Member States are governed by the Convention, with the other nine being bound by some or all of the older instruments.⁶⁹

The evolution of the 1949 Convention can be traced through the various instruments on trafficking which came before it. The aim of the 1904 Agreement was to secure "to women of full age who have suffered abuse or compulsion, as also to women and girls under age, effective protection against the criminal traffic known as the "White Slave

⁶⁶ The Preamble to the Convention lists these as being the International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic, the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic (both as amended by the Protocol adopted by the General Assembly of the United Nations on 3 December 1948), the International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children, and the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age (the latter two as amended by the Protocol adopted by the General Assembly of the United Nations on 20 October 1947).

⁶⁷ Article 28 of the Convention. The ultimate aim was to terminate the previous agreements once all parties to them had acceded to the 1949 Convention. It does not seem that this will ever happen.

⁶⁸ Belgium, Denmark, Finland, France, Italy, Luxembourg, Portugal and Spain. This would seem to be unfortunate as the central and eastern European countries which the IOM cites as the main countries of origin of victims have all acceded to the Convention. IOM: 1995, pp 9-10. The European Parliament has called on the other Member States to accede to the Convention: Resolution on the exploitation in prostitution and the traffic in human beings, point 8.1, [1989] OJ C120/354, but later called it an 'obsolete and ineffective' document which needs to be replaced: Resolution on Trafficking in human beings, point 31, [1996] OJ C32/92.

⁶⁹ Greece is not a party to the 1904 Agreement and Austria and Greece are not parties to the 1910 Convention. Denmark and Italy are not parties to the 1933 Convention. Budapest Group, *op cit.*, Annex II. This report did not include information on Luxembourg. Given the vintage of these older instruments and the fact that they are no longer referred to in actions on trafficking (in particular the EU instruments discussed in chapter two) they will not be considered further in this paper.

Traffic”..’⁷⁰ and leaves aside those situations where no compulsion or abuse is involved except where minors were concerned. Under the 1910 Convention the signatories agreed to punish the procurers. Both of these instruments limit themselves by addressing procurement and considering situations where the woman has entered prostitution (even against her will) to be purely a matter for internal legislation. The provisions of these instruments were extended by the 1921 Convention to cover children of both sexes. The 1933 Convention removes the condition of constraint but only with regard to the international traffic in women. Even consent did not exempt certain acts, however, including the procurement of women for immoral purposes in another country.⁷¹

As a result of its dealings with the instruments outlined above, in 1937 the League of Nations prepared a draft ‘Consolidated Convention’ the aim of which was to abolish any regulation of prostitution, repress third-party profiting from prostitution, and rehabilitate female victims. The League justified this by arguing that the existence of brothels was no longer a purely domestic question as they were the centre of the trafficking system.⁷²

Upon its inception, the mantle passed to the newly created United Nations which quickly set about continuing the work of its predecessor. Building upon the experience gained by the League of Nations, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others was concluded in December 1949 and entered into force on the 25th July 1951.

Under the 1949 Convention the States Parties undertake to punish procurers and exploiters of prostitution (Article 1), to punish brothel keepers (Article 2) [the offences in Articles 1 and 2 are subject to the proviso in Article 12 that each State may define, prosecute and punish offences according to its own law], to allow victims to be parties to criminal proceedings against traffickers (Article 5), to abolish all types of registration of prostitutes (Article 6), to take previous convictions of traffickers into account (Article 7), to extradite persons involved in Article 1 or Article 2 offences (Article 8) or to punish

⁷⁰ Preamble to 1904 Agreement.

⁷¹ Article 1.

⁷² Demleitner, loc cit., p 171.

them for offences committed abroad if extradition is not possible (Article 9), to deal with letters of request from other signatories to the Convention (Article 13), to establish services to co-ordinate the results of investigations into offences under the Convention (Article 14), to ensure that such services provide corresponding services in other States with information on movement of persons and records of offenders (Article 15), to use public services to rehabilitate prostitutes (Article 16), to employ immigration measures - such as warnings about the dangers of trafficking and supervision of border crossings, etc. (Article 17), to take information from victims in order to investigate how they were trafficked and also to repatriate them (Article 18) and to supervise employment agencies (Article 20).

Thus, it will be noted that the 1949 Convention is a detailed and comprehensive document. It has not had the impact on trafficking that many had hoped it would, however, and indeed it has never been fully accepted by the international community. In chapter two the problems which have prevented this instrument from achieving its objectives will be discussed.

1.5.2 Relevant International Law.

Various observers have pointed to different instruments and norms under international law which could be used to either base action against trafficking in women upon or to compel governments to take action. These are considered briefly in the following paragraphs with the two following reservations. Firstly, one can point to many examples where the issue of trafficking in women was addressed in or by organs of the United Nations, but given that action at this level is not the focus of the present paper, some illustrative examples only are included.

Secondly, while it is indeed true that action could be based on such provisions, even though their purpose is not specifically to tackle trafficking, by any government who wished to do so, this is unlikely to happen as governments generally partake in international action on particular issue only when they are obliged to meet specific

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1. *Introduction*

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commitments made on their behalf. Governments could do many things if they wanted to but often only act when they have to. That the trafficking in women has increased rather than decreased in the fifty years since 1949 seems to indicate that the first of these conditions does not apply.

*(a) Charter based mechanisms*⁷³

The treaties only apply to countries which have ratified them, but UN Charter based mechanisms to protect human rights may also be used to address trafficking in any UN member state. This includes the examination of reports by NGOs by relevant committees within the UN.⁷⁴ The UN Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and protection of Minorities have adopted a series of Resolutions for adoption to the Economic and Social Council proposing various measures for states to implement to end trafficking and prostitution.⁷⁵ The Working Group on Contemporary Forms of Slavery, established in 1974⁷⁶ had as its main theme in 1991 the prevention of traffic in persons and the exploitation of the prostitution of others. The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, significantly, may intervene on behalf of individuals and reports the replies received from the governments concerned. The Special Rapporteur on Violence against Women may also engage in 'direct dialogue' with governments concerning reports of violence against women received. Finally, the UN Commission on the Status of Women may receive communications but may only make recommendations on the basis of these to ECOSOC.⁷⁷

⁷³ The following paragraph is based on the discussion to be found at Farrior, loc. cit., p 238 et seq.

⁷⁴ Resolution 1235 of ECOSOC allows NGOs to put forward information relevant to gross violations of human rights and fundamental freedoms to the Commission for examination, which it does in public – thus it may have the effect of embarrassing a government into action, and under ECOSOC Resolution 1503, investigations may also be made on the basis of individual or NGO reports.

⁷⁵ E.g. Resolution 1998/30 on Traffic in Women and Girls which, significantly, does not call on member states to ratify 1949 Convention but calls on them to implement the platform for Action of the Fourth World Conference on Women. Significantly the corresponding resolution adopted by the Economic and Social Council (1998/20) states that the Council decided that an international instrument on trafficking be discussed in the context of the transnational organized crime convention, discussed infra.

⁷⁶ Decision 16(LVI), 56th Sess., UN Doc. E/5544 (1974)

⁷⁷ ECOSOC itself has received reports which address trafficking and related issues.

(b) Instruments.

Stephanie Farrior⁷⁸ discusses various other international instruments which could be of use in combating trafficking. Of particular interest is the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery, 1956⁷⁹ which requires states parties to impose domestic criminal sanctions on individuals who engage in, selling women, turning children over for exploitation, and debt bondage schemes, among other things⁸⁰. Other specific criminal offences under the Supplementary Convention are “conveying or attempting to convey slaves” (Article 3(1)) and the “act of enslaving another person or of inducing another person...into slavery” (Article 6(1)). As in the 1949 Convention, states parties are to exchange information and inform each other of every attempt to commit such offences (Article 3(3)).

Farrior⁸¹ also considers two relevant International Labour Organisation conventions⁸² and notes that the enforcement procedures within the ILO are stronger than the more traditional ‘reporting procedure’ seen in UN conventions, as complaints may be filed against states which are not in compliance with their obligations. In addition, there exists a periodic reporting mechanism for ILO member states that have not ratified a particular ILO convention⁸³.

She refers to the individual complaint procedure envisaged by the International Covenant on Civil and Political Rights, 1976⁸⁴ whereby an individual who believes that his or her rights⁸⁵ under the Covenant have been violated may submit a complaint to the Human

⁷⁸ Ibid.

⁷⁹ 266 U.N.T.S. 40. Enacted as a supplement to the Slavery Convention of 1926 (60 L.N.T.S. 253). Some observers believe that equating trafficking with slavery may be confusing. See Demleitner, loc. cit., p 193.

⁸⁰ Farrior, loc. cit., page 222.

⁸¹ Ibid., page 224.

⁸² The Forced Labour Convention 1930 (39 U.N.T.S. 55) and the Abolition of Forced Labour Convention 1957 (320 U.N.T.S. 291). Also under the auspices of the ILO are ILO Convention No. 143 Concerning Migration in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, 1975 and Convention C182, the Worst Forms of Child Labour Convention, 1999.

⁸³ Constitution of the International Labour Organisation, 15 U.N.T.S. 18, Article 19(5)(e).

⁸⁴ Farrior, loc. cit., page 226.

⁸⁵ Article 8(1) of the Covenant provides that “no one shall be held in slavery; slavery and the slave trade in all their forms shall be prohibited. By virtue of Article 2 of the Covenant, States parties violate their

Rights Committee⁸⁶. Finally, the Convention on the Elimination of all forms of Discrimination Against Women, 1979⁸⁷ requires states parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women".⁸⁸ The Committee on the elimination of discrimination against women, which was established by the Convention, elaborates what states must do in order to comply with its obligations⁸⁹.

*(c) UN Protocol to Prevent, Suppress and Punish Trafficking.*⁹⁰

The United Nations is to try its hand once again in relation to trafficking, this time in the context of the ad hoc Committee on the elaboration of a convention against transnational organized crime in which a Protocol to prevent, suppress and punish trafficking in persons, especially women is currently under discussion. The preamble of the current draft of the Protocol states:

" *Taking into account* the fact that, despite the existence of a variety of international instruments containing rules and practical measures to combat the sexual exploitation of women and children, there is no universal instrument that addresses all aspects of trafficking in persons,"

that the states parties are;

obligations if they fail to exercise due diligence to end slavery and the slave trade by non-state actors within their jurisdiction.

⁸⁶ Set up under Article 28, 999 U.N.T.S. 171. Provided the state in question has ratified the first optional protocol to the Convention. Such a complaint has never been taken in relation to trafficking, however.

⁸⁷ Article 6.

⁸⁸ Recommendation (g) of CEDAW states that "Specific preventative and punitive measures are necessary to overcome trafficking and sexual exploitation" while recommendation (h) requests states parties to report on the measures taken on trafficking and also on the effectiveness of such measures.

⁸⁹ Farrior, loc. cit., page 227. Another observer has noted, however, that while this amounts to a formal mandate to supervise the implementation of international provisions relating to the traffic and prostitution of women, there are serious enforcement difficulties as UN committees are unable ensure enforcement: HAUBER, Laurie. *The Trafficking of Women for Prostitution: a growing problem within the European Union*. 21 *B.C. Int'l & Comp. L. Rev.* 183, at p 58.

“ *Concerned* that, in the absence of such an instrument, persons who are vulnerable to trafficking will not be sufficiently protected.”

An odd statement, particularly given that no mention of the 1949 Convention is made in the Preamble. Further, Article 15 of the draft Protocol, the savings clause, states that nothing in the Protocol shall affect the rights, obligations and responsibilities of individuals and States under international law, again without referring to the Convention.⁹¹

The Protocol is still under discussion and will certainly not be finalised before the end of 1999.⁹² In its current form Article 3 of the Protocol obliges parties to it to criminalize the conduct set forth in Article 2 of the Protocol, which was discussed in the context of definitions of trafficking, above. The draft Protocol also contains several articles on victims and cooperation between authorities as well as with NGOs. It will certainly be interesting to see whether this draft Protocol will enjoy more success than its predecessor, the 1949 Convention did.

1.6 The Council of Europe.

The most significant instrument adopted by the Council of Europe, as far as trafficking is concerned, is European Convention for the Protection of Human Rights and Fundamental Freedoms.⁹³ Article 3 of the Convention provides that “No one shall be subjected to torture or to inhuman or degrading treatment”, and Article 4 that “1. No one shall be held in slavery or servitude; 2. No one shall be required to perform forced or compulsory labour.” Article 1 of the Convention, which obliges the parties to the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention has been interpreted as covering state inaction where legislation is

⁹⁰UN General Assembly document A/AC.254/4/Add.3/Rev.2.

⁹¹Nor does it refer to Article 6 of CEDAW.

⁹²The next meeting of the ad hoc Committee is in the winter of 1999.

⁹³4 November 1950, 5 ETS 21.

necessary to protect the rights and freedoms established by the Convention.⁹⁴ Toepfer and Wells argue that Articles 3, 4 or even 14 (discrimination on the grounds of sex) could provide protection against trafficking, particularly pimping, forced prostitution and the selling of women while acknowledging that this would require a wider interpretation of the Convention than is likely⁹⁵

In its Recommendation 161 of 1958, the Parliamentary Assembly of the Council of Europe recommended that all member states accede to the 1949 Convention or ratify it if they have already done so.⁹⁶ Parliamentary Assembly Recommendation 1325 of 1997 recommends that the Committee of Ministers elaborate a convention on traffic in women and forced prostitution⁹⁷ and that, as a provisional measure, it adopt a recommendation dealing specifically with the problem of the traffic and forced prostitution and specifying measures to be taken by member states⁹⁸. It also recommends that the Committee of Ministers urge the member states to adopt specific measures⁹⁹ which it lists.¹⁰⁰

In response the Committee of Ministers created a Multisectoral Group on Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation. Under its terms of reference, adopted in June 1997, the task of the Group is "to plan and prepare actions that the Council of Europe could undertake in the field of combating traffic in human beings for the purpose of sexual exploitation, and in particular traffic in women and children,

⁹⁴ *James and Webster v. United Kingdom*, App. Nos. 7601/76 and 7806/77, 44 Eur. Ct. H.R. (ser. A) (1981)

⁹⁵ TOEPFER, Susan Jeanne and WELLS, Bryan Stewart. The worldwide market for sex: a review of international and legal prohibitions regarding trafficking in women. 2 *Mich. J. Gender & Law* 83. Section III. In contrast, Article 6(1) of the American Convention on Human Rights (22 November 1969, 1970 OAS T.S. No. 36) provides that "No one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women."

⁹⁶ Recommendation 161 (1958) calling for the speedy ratification of the International Convention of the 2nd December 1949 for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution, Article 1.

⁹⁷ Article 4. Article 3 states that the Council of Europe is ideally placed to take the lead in combating trafficking, despite the recommendation by the Group of Specialists that it would be preferable for the UN to draw up a Convention.

⁹⁸ Article 5.

⁹⁹ Article 6 i – xii.

¹⁰⁰ The member states have already undertaken obligations under Recommendation No. (91) 11 of the Committee of Ministers on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults, and the 1993 Declaration on violence against women – under which violence is understood as including trafficking in women and forced prostitution (Article 2), against which states are to develop penal, civil, labour and administrative sanctions in domestic legislation (Article 4).

notably girls.”¹⁰¹ This Group is in the process of preparing a draft Recommendation containing principles and suggested action at national level.¹⁰² The possibility of a Convention will be returned to once the Recommendation is completed.¹⁰³

1.7 Chapter Conclusion.

This chapter was intended to introduce the problem of trafficking of women for the purpose of sexual exploitation and efforts to combat this activity at the international level.

Despite a rather detailed Convention addressing the phenomenon, almost fifty years after this document was concluded the trafficking in women continues in greater numbers than before. Moreover, there is still a lack of an agreed definition of what trafficking in women is. We may note that of the seven definitions examined in section 1.2, not one has followed the abolitionist stance of the 1949 Convention. Perhaps the Convention was too ambitious in trying to eradicate prostitution as well as trafficking. Nevertheless, in one important respect, the 1949 Convention has been followed, as the crossing of international borders it is no longer viewed as essential to identify instances of trafficking.

On the topic of prostitution, it was noted that the debate between abolitionists and regulationists continues. It was also seen that the link between prostitution and trafficking seems to indicate that the regulation of prostitution may not, in fact, reduce trafficking, but may encourage this activity. In the context of an instrument to combat trafficking it was concluded that the term ‘sexual exploitation’ setting a minimum standard of ‘forced prostitution’ would allow agreement between those states which favour the abolitionist approach and those in favour of regulation. This should be seen as a ‘worst case scenario’ however, and efforts to include other forms of sexual exploitation should certainly be pursued. The possibility of some countries adopting a higher standard than others will be

¹⁰¹ Decision of the Committee of Ministers (CM/Del/Dec(97)592/3.1) Article 3.

¹⁰² Ibid. Article 4.

¹⁰³ Ibid. Article 7.

returned to in the next chapter in the context of closer cooperation between the Member States of the European Union.

Specifically on the notion of force, it was considered that in practice this would be difficult, if not impossible, to prove and may introduce a significant weakness in any law designed to combat trafficking. By reversing the burden of proof and introducing a rebuttable presumption that non EU citizens working as prostitutes have been trafficked the traffickers would be presented with a powerful disincentive.

Finally the relevant international instruments were briefly reviewed. A critique of how these have performed in relation to the trafficking of women and the functioning of international instruments generally in this context will be offered in the next chapter. A new initiative by the UN in the form of a Protocol to the Convention against transnational organised crime will, regretfully, suffer from many of these drawbacks if and when it enters into force.

The EU 15 do not have to wait for the UN Protocol to be completed in order to tackle the trafficking of women into the EU, however, as they may take an initiative of their own. Let us now turn to consider this possibility in chapter two.

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Chapter Two

Can the EU take the Initiative ?

2.1 Introduction.

In chapter one we looked at the phenomenon of trafficking in women and the various structures through which action to counter this activity can be co-ordinated. With the problem of trafficking in women thus set in context, this chapter will begin with a brief critique of the mechanisms available under international law to tackle it. As will be seen, much of this argument will turn on the nature of international law rather than on the approach behind the international instruments themselves. It will be submitted that international law cannot 'deliver' the results needed to put a stop to trafficking as too much depends on the willingness of states to take action.

The discussion will then turn to the European Union and it is hoped to contrast some of the weaknesses in the international approach with the possibilities of a more integrated approach to common problems among the EU 15. Further, it will be argued that action at EU level to combat trafficking in women is necessary given the degree of integration among the states of this Union. The different possible courses of action under the EC Treaty and the TEU will be examined. The role of the ECJ shall emerge as an important element to be considered when evaluating the possible contribution to be made by an EU instrument to the fight against trafficking. The chapter will conclude with an evaluation of the choices for action open to the Union.

2.2 Weaknesses of existing international instruments

As we have seen in chapter one, trafficking is on the increase in Europe and in other regions of the world as well. Clearly the current regime for tackling this activity is not working.

The 1949 Convention has many critics. This partly due to the number of countries which have acceded to the Convention (just 72¹⁰⁴) but other defects have also been found in the form of internal conflicts within the Convention itself.¹⁰⁵ Toepfer and Wells note some signatories either ignore trafficking within their countries or ignore their obligations under the Convention altogether.¹⁰⁶ Stephanie Farrior notes that the Convention takes a limited approach in its measures to stop trafficking as it affords little protection of the rights of victims¹⁰⁷ and ignores the socio-economic reasons behind trafficking for prostitution¹⁰⁸. She notes too that the Swedish government, one of the firmest anti-prostitution Member States in the EU, consider the Convention to be 'obsolete' and of an 'old fashioned spirit'.¹⁰⁹

Finally, the 1949 Convention contains no means of enforcing the obligations which it contains. Under Article 21 States Parties must report annually to the Secretary-General on laws and regulations in their states relating to subjects covered by the Convention. No independent supervisory body exists with authority to question the reports of States Parties, issue recommendations to the States Parties on the basis of these reports, or receive or act on petitions brought by victims of trafficking who allege that a State Party has failed to try to eliminate trafficking¹¹⁰. Also, individual victims can neither bring a claim under international law against her pimp or purchaser nor require a signatory nation to bring a legal claim on her behalf. Thus, the inadequate enforcement mechanisms of the treaties undercut their substantive provisions.

¹⁰⁴ UN website (<http://www.un.org>) searched 18th September, 1999. Chuang, loc. cit., believes that many states have not acceded to the Convention as it addresses domestic prostitution as a matter of international law, p 75.

¹⁰⁵ Such as the commitment to abolish all forms of registration of prostitutes (Article 6) versus the obligation to record information on trafficking victims (Article 18) or the conflict between the commitment to punish procurers and exploiters of prostitution in Article 1 and the competence of each state party to the Convention to define, prosecute and punish offences according to its own law (Article 12). Some also see the commitment to prosecute offenders as being a dubious one – citing Articles 18 and 19 which allow for the repatriation of victims, who would be the main witnesses in any prosecution. See Farrior, loc. cit., p 219.

¹⁰⁶ Toepfer and Wells, loc. cit., Section II.

¹⁰⁷ This is a point which seems to have been taken on board as the draft UN Protocol on trafficking contains several provisions on the situation of victims. Chapter 1, *supra*.

¹⁰⁸ Farrior, loc. cit., p 217.

¹⁰⁹ Farrior, loc. cit., p 220.

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The problem of enforcement is a general one in the field of international law¹¹¹. Toepfer and Wells conclude that the 1949 Convention and CEDAW¹¹² cannot be successfully enforced.¹¹³ Regarding the 1949 Convention it is noted that some signatories either ignore trafficking within their countries or ignore their obligations altogether. The enforcement structures are inadequate, as the likelihood of a woman convincing a state party to bring a legal action against another state is remote.

In the context of trafficking, two criticisms can be fairly levelled against treaty based procedures. Firstly, as Farrior notes, although there is a broad range of treaties relating to trafficking, 'the problem lies in the lack of implementation, as reflected both in the inadequacy of municipal laws and in lack of enforcement of existing laws'¹¹⁴. She goes on to say that she believes that instruments such as the Civil and Political rights Covenant and the Women's Convention contain procedures for pressurising governments which are superior to those in the Slavery and Trafficking Conventions¹¹⁵.

Secondly, Janie Chuang believes that international law itself may not be the correct vehicle for dealing with trafficking:

"Where international anti-trafficking laws apply, their capacity to provide effective remedies to victims of trafficking and forced prostitution is compromised by conflicting domestic immigration and anti-prostitution laws, which, in the absence of international legal standards, would hold these women criminally liable for prostitution and illegal immigration. The unfortunate reality of international law is that states often are reluctant

¹¹⁰ Ibid., page 220.

¹¹¹ The only real method of enforcement by way of a judgment by the International Court of Justice as a result of an action by one state party against another. The importance of the right of individual complaints under Article 25 ECHR thus becomes apparent. Further, the ECHR, as has been noted in Chapter one, does allow individuals to take cases against states parties where the right in question required domestic legislation for it to be effective. An important enforcement mechanism such as this can be a very effective way of ensuring compliance by states.

¹¹² They note that the CEDAW reporting procedure is flawed and the Convention itself is 'riddled' with exceptions (section II).

¹¹³ Toepfer and Wells, loc. cit., section II.

¹¹⁴ Ibid., page 253.

¹¹⁵ Ibid., page 254. Discussed in chapter 1, supra.

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to forego the enforcement of their domestic laws in order to adhere to international legal standards. Moreover, the fact that law enforcement officials sometimes are complicit, if not active participants, in trafficking and forced labour schemes can create a disincentive against local enforcement of international anti-trafficking law.”¹¹⁶

From these remarks we may conclude that the most recent international instrument on trafficking, the 1949 Convention, suffers from several built-in problems. It also has a serious enforcement problem, as states parties seem to be ignoring their responsibilities without incurring any negative consequences. While the difficulty of enforcing obligations is by no means unique to the 1949 Convention, the provisions of later instruments, such as the Civil and Political Rights Covenant and CEDAW, may to some extent be safeguarded by committees established for this purpose.¹¹⁷ States continue to be reluctant to forgo their national laws, however. Secondly, the 1949 Convention provides the victim with no redress against her traffickers.

2.3 Co-operation on Criminal Law at the International Level.

Trafficking must be seen in the wider context of international crime, notwithstanding the fact that it may also occur within countries and without any international dimension. The current regime for tackling trans-border crime is one based on inter-governmental treaties under international law.

The UN has produced several instruments aimed at improving international co-operation in the field of criminal law, including a model treaty on extradition¹¹⁸, a model treaty on mutual assistance¹¹⁹ and a convention on drug trafficking¹²⁰. In addition, much co-

¹¹⁶ Chuang, loc. cit., p 67.

¹¹⁷ See chapter one section 1.4, supra.

¹¹⁸ UN Model Treaty on Extradition (1990), VAN DEN WYNGAERT, Christine (ed.). International Criminal Law – A collection of International and European Instruments. The Hague, Kluwer Law International, 1996. p 187.

¹¹⁹ UN Model Treaty on Mutual Assistance in Criminal Matters (1990), Ibid. p 319, and Optional Protocol thereto, Ibid. p 327.

¹²⁰ Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Ibid. p 83.

operation in criminal matters has already been achieved through the various Conventions of the Council of Europe, particularly in the areas of extradition¹²¹, terrorism¹²², mutual assistance in criminal matters¹²³, the proceeds of crime¹²⁴, drug traffic¹²⁵, the transfer of proceedings¹²⁶ and the enforcement of criminal sanctions¹²⁷. Indeed the EU Joint Action on trafficking¹²⁸ requires that the offences outlined by it are co-ordinated within the scope of application of the 1990 Council of Europe Convention on money laundering thus outlining the importance of the contribution made by instruments such as these to the effort to co-ordinate the combating of criminality in Europe.¹²⁹

It may be noted, however, that the two hallmarks of international criminal co-operation between states are the requirement of dual criminality and the protection of the sovereignty of the states parties. The former, mostly associated with extradition¹³⁰ but also to be seen in the European Convention on Mutual Assistance¹³¹ and the Convention on the Validity of Criminal Judgments¹³². The respect for the sovereignty of the states parties to the various treaties underlines their inter-governmental nature, typical of international law, and can be seen in the Money Laundering Convention¹³³ and the Convention on Mutual Assistance¹³⁴ for example.

¹²¹ European Convention on Extradition, ETS No. 24 and Protocols ETS No. 86, ETS No. 98.

¹²² European Convention on the Suppression of Terrorism, ETS No. 90

¹²³ European Convention on Mutual Assistance in Criminal Matters, ETS No. 30, and the Additional Protocol thereto, ETS No. 99

¹²⁴ Convention of Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, ETS No. 141

¹²⁵ Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against illicit Traffic in Narcotic Drugs and Psychotropic Substances, ETS No. 156

¹²⁶ European Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 73

¹²⁷ European Convention on the International Validity of Criminal Judgments, ETS No. 70

¹²⁸ [1997] OJ L63/2.

¹²⁹ Title II A(e) of the joint action.

¹³⁰ With regard to extradition it has been noted that 'if the condition of double criminality is not met by the requested state, the offences can never, by definition, be punishable offences', report by SCHULTZ, Hans. The Principles of the Traditional Law of Extradition . IN: COUNCIL OF EUROPE. Legal Aspects of Extradition Among States. Strasbourg, Council of Europe, 1970. P 13.

¹³¹ ETS No. 99, Article 5 (1)(a).

¹³² ETS No. 70, Article 4(1).

¹³³ ETS No. 141, Article 18(1)b.

¹³⁴ ETS No. 30, Article 2(a).



2.4 Why an EU Initiative ?

There are many international instruments which deal either directly or indirectly with the problem of trafficking. The question must be asked, therefore, what the advantage of more paper promises would be. It has been noted that the enforcement of obligations which states undertake as parties to international agreements is difficult. This is the case from the perspective of the state vis-à-vis the international institution under the auspices of which a treaty concluded and also from the viewpoint of the individual victim. Also not all EU Member States are parties to the same instruments and there seems to be no prospect that all Member States will become parties to the 1949 Convention. A common approach among the 15 Member States would therefore require a new instrument, although this need not, of course, be concluded under the auspices of the EU – the UN¹³⁵ or the Council of Europe being better placed to undertake such a task.¹³⁶

It must then be asked firstly, what interest does the EU have in tackling trafficking, and secondly what would the added value of an EU instrument be ?

2.4.1 Interest of the EU.

It has been assumed above that the 15 have an interest in dealing with the phenomenon of trafficking collectively, but why should this be at an EU level ?

Given that the problem of trafficking is a global one, and concerns many countries which are not Member States of the EU, the European Union must firstly be regarded as a reasonable territory for tackling problems of international crime effectively, as opposed to a global or regional arrangement, if one is to decide in favour of taking action at the level of the Union. Taking the example of police cooperation, it has been noted that the

¹³⁵ In 1996 the European Parliament called “upon the Commission and the Member States to take action at an international level to draft a new UN convention to supersede the [1949] Convention”, Resolution on trafficking in human beings, point 31, OJ [1996] C32/92.

¹³⁶ Given that the mandates of both of these bodies include the tackling of international problems. In addition neither the UN or the Council of Europe requires agreement by all, or even a majority, of its members to conclude an agreement and are thus not constrained by their slowest moving member states.

establishment of Europol suggests broad acceptance that the EU is acceptable as a suitable geographic space for enforcement co-operation¹³⁷.

Turning to trafficking, it is by very nature, frequently a trans-border crime. Thus the IOM has noted that as policy measures taken in one country to reduce trafficking may simply have a 'displacement effect' – because stricter laws in one country will encourage traffickers to shift their focus to nearby countries with less repressive laws - it is essential that EU governments co-ordinate their policies¹³⁸. A second argument focuses on the nature of the EU itself. The removal of internal borders¹³⁹ within the EU, particularly in the context of Title IV of the EC Treaty (discussed below) and the incorporation of the Schengen¹⁴⁰ acquis into the framework of the European Union,¹⁴¹ has naturally facilitated traffickers. It is therefore appropriate that the EU take the necessary measures to counteract the negative side effects of integration. In this regard it may also be noted that cross-border co-operation is often hampered by the diversity of national rules and substantive offences. Thirdly, trafficking is an activity in direct conflict with one of the objectives of the Union – “to provide citizens with a high level of safety within an area of freedom, security and justice” which in turn is “to be achieved by preventing and combating crime, organised or otherwise, in particular...trafficking in persons and offences against children...” – as stated in Article 29 TEU.

Within the Institutions of the Union itself, there seems to be support for the idea of an EU instrument, particularly by the European Parliament and the Commission. The European Parliament Committee on Women's Rights has proposed that the Member States “draft a convention providing for common provisions for sanctions against trafficking in human

¹³⁷ Anderson et al, op cit., p 280. The authors note, however, that not all observers are agreed that the EU covers the optimal geographic area, at p 70.

¹³⁸ IOM: 1996, op cit., p 17.

¹³⁹ While there is a general expectation in law enforcement circles that a border-free Europe will make crime control more difficult and that crime will rise, there are conflicting views on whether borders are useful against crime. Anderson et al, op cit., p 16.

¹⁴⁰ The main philosophy behind Schengen being to guarantee internal security by measures to compensate the opening of borders. Ibid. p 57.

¹⁴¹ Treaty of Amsterdam Protocol (No 2) integrating the Schengen acquis into the framework of the European Union (1997).

beings with sentences which reflect the seriousness of the offence”¹⁴². Commissioner Anita Gradin expressed the view that “there is a clear need for a political initiative at the EU level [on the issue of trafficking of women for sexual exploitation]”¹⁴³ while, as was noted in chapter one, the Commission itself has recently stated that the fight against the trafficking in human beings is one of its major priorities in the field of immigration¹⁴⁴.

2.4.2 The added value of an EU Instrument.

While the motivation to draft an Instrument dealing with trafficking may exist at EU level, such a move should add something extra to the current body of law. In this respect it must be recalled that the EU differs from other international organisations, its hallmarks being its supranational character¹⁴⁵ and the application and enforcement of its legislation within its Member States. It would thus seem to be well placed to tackle two of the main problems encountered by instruments governed by international law, namely, the difficulty of making states comply with obligations which they have undertaken and the lack of redress open to individuals who have suffered as a result of state inaction.

Further, the possibility of the 15 reaching agreement on measures which are more stringent or are more intrusive upon national sovereignty would seem to be more likely than would be possible at a global level, despite the importance placed on national sovereignty concerning internal security measures by the Member States¹⁴⁶. The high

¹⁴² WADDINGTON, S.A. Report on the Communication from the Commission to the Council and the European Parliament on trafficking in women for the purpose of sexual exploitation. 27 November 1997 PE 222.558/fin., p 7. Adopted by the Parliament [1998] OJ C14/25.

¹⁴³ Closing address by Commissioner Gradin at the Conference on Trafficking in Women, Op cit. P 75. The Commission also believes that the implementation of the 1949 Convention needs to be ‘reviewed and strengthened’, COM (96) 567 final p36.

¹⁴⁴ Towards an Area of Freedom, Security and Justice, COM (1998) 459 final p 6.

¹⁴⁵ Case 6/64, *Costa v. ENEL* [1964] 585. Certainly the supranational character of the European Communities. Even the ‘third pillar’ has become a hybrid of intergovernmentalism and supranationalism as a result of the Amsterdam Treaty. Some of the important advantages which the Community system has over international law are the establishment of a procedure for supervising the implementation of agreements, that (some) agreements at EC level form part of the domestic law of the Member States and the ensuring of uniform interpretation of agreements by the ECJ, see CAPPELLETTI, Mauro, et al (eds.). *Integration Through Law. Europe and the American Federal Experience*. Berlin: Walter de Gruyter for the European University Institute, 1986. Vol. 1, Book 1, p 239.

¹⁴⁶ It has proven difficult, however, for the 15 to even reach a common position on the draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children, supplementing the

degree of judicial and police cooperation already in place within the Union¹⁴⁷ indicates that a legislative instrument specifically tailored to this unique situation might be more useful than an instrument which is designed to be compatible with all systems. Finally, an EU initiative would consolidate the considerable progress achieved to date in relation to trafficking.

2.5 Current EU Initiatives

Although trafficking in women had been discussed on several occasions in the European Parliament¹⁴⁸ it was not until the EU began to develop competence in justice and home affairs that any concrete action was taken. In 1993 the JHA Council adopted Recommendations on Trade in Human Beings for the Purposes of Prostitution¹⁴⁹ and three years later the Commission hosted an international conference in Vienna where how best to combat trafficking was discussed. This was quickly followed by a Commission Communication to the Council and the European Parliament on the matter¹⁵⁰. Several initiatives at EU level have been taken as a result. At the end of 1998 the Commission addressed a second Communication concerning trafficking to the European Parliament and the Council on further actions on the fight against trafficking in women¹⁵¹ which proposed various action points to be taken by the Commission and the Member States.

Turning to current actions, firstly, the Commission administers several funding programmes which are of relevance to trafficking which facilitate cooperation and

UN Convention against Transnational Organized Crime, the focus has therefore been on establishing 'common elements' amongst the Member States.

¹⁴⁷ For example this is addressed in Title II E. of the Joint Action on trafficking [1997] OJ L633/4.

¹⁴⁸ The following Resolutions were adopted: Resolution on violence against women [1986] OJ C176/73, Resolution on the exploitation of prostitution and the traffic in human beings [1989] OJ C120/352, Resolution on trade in women [1993] OJ C268/141, Resolution on trafficking in human beings [1996] OJ C32/89.

¹⁴⁹ These focused on information exchange. Council Press Release 10550/93 of 29-30 November 1993, cited in Commission Communication to the Council and the European Parliament on trafficking in women for the purposes of sexual exploitation, COM (96) 567 final, at p 35.

¹⁵⁰ COM (96) 567 final.

¹⁵¹ COM (1998) 726 final. A report on this Communication is due to be adopted by the Women's rights and equal opportunities committee of the European Parliament on the 24th November 1999.

research. The most notable of these in the field of trafficking are the STOP and DAPHNE programmes. The STOP programme was adopted by the Council of the EU in November 1996 and its purpose is to develop co-ordinated initiatives on the combating of trade in human beings and the sexual exploitation of minors.¹⁵² The DAPHNE programme is used to fund NGO action relating to children, young persons and women.¹⁵³ ¹⁵⁴ The Commission has also funded an information campaign in Poland using PHARE funding.¹⁵⁵

Secondly, the EU undertook measures which would have a more direct impact in combating trafficking in women. Thus prior to the entry into force of the Europol Convention¹⁵⁶, the mandate of the Europol Drugs Unit was extended to include trafficking.¹⁵⁷ Two more initiatives were also adopted which may be seen as imposing obligations on the Member States of the EU. These are the Council Joint Action of 24th February, 1997 and The Hague Ministerial Declaration of the 26th April, 1997.¹⁵⁸ The Commission had intended to bring forward a legislative proposal regarding temporary permits of stay for victims who are ready to act as witnesses¹⁵⁹ but it now appears that this may be postponed and included in a more general action on migration.¹⁶⁰

¹⁵² Joint Action of 29 November 1996, establishing an incentive and exchange programme for persons responsible for combating trafficking (the STOP programme), [1996] OJ L322/7. The programme runs from 1996 to 2000.

¹⁵³ The European Parliament inserted into the 1997 Community budget line B3-4109 to fund this programme. The Commission has now proposed that a Council Decision based on Article 308 EC be taken to give a legal base to the programme.

¹⁵⁴ Other programmes which could be used are Falcone [1998] OJ L99/8, Odysseus [1998] OJ L99/2, Oisin [1997] OJ L7/5, Grotius [1996] OJ L287/3 as well as PHARE, TACIS and LIEN funds.

¹⁵⁵ As part of the New Transatlantic Agenda on US-EU Co-operation.

¹⁵⁶ [1995] OJ C316/1 entered into force 1 October 1998.

¹⁵⁷ Joint Action of 16 December 1996, [1996] OJ L342/4.

¹⁵⁸ See *infra*. Other initiatives have also been taken but as they do not directly impose obligations on Member States they will not be considered in the main body of the paper. These include: the Joint Action concerning the directory of special competences, skills and expertise in the fight against organised crime, [1996] OJ 342/2; the Joint Action extending the mandate of the EDU to cover trafficking [1996] OJ L324/4. PHARE democracy funds have also been used to finance an information campaign in Poland during 1998.

¹⁵⁹ Communication from the Commission to the Council and the European Parliament for further actions in the fight against trafficking in women, COM (1998) 726 final, page 10.

¹⁶⁰ Interviews with Commission officials 9th June 1999.

2.5.1 The Basis and Effect of Actions taken under the Treaty of Maastricht.

Both joint actions were adopted under Article K3 of the TEU, as it was before the Treaty of Amsterdam, point 2(b) of which allows the Council to adopt a joint action 'in so far as the objectives of the Union can be attained better by joint action than by the Member States acting individually on account of the scale or effects of the action envisaged' in the areas referred to in (the then) Article K1. Article K1 (1) to (9) specifies certain areas which are to be considered as 'matters of common interest'.

The joint action adopted as a basis for the STOP programme¹⁶¹ does not state under which subsection of Article K1 it is deemed to be a matter of common interest, merely stating in its preamble 'Whereas it is considered a matter of common interest to increase cooperation in the fields of justice and home affairs on the combating of trade in human beings and the sexual exploitation of children'. The later joint action, on trafficking in human beings and the sexual exploitation of children,¹⁶² is more specific and cites both Article K1(3) – immigration policy regarding nationals of third countries- and Article K1(7) – judicial cooperation in criminal matters- as its basis.

The legal effect of a joint action is not clear. Article J3(4) TEU specified that joint actions were to commit the Member States in the positions they adopt and in the conduct of their activity, but this was in the context of the then Title V Provisions on a common foreign and security policy. It would seem, however, that joint actions adopted under Title VI were, in fact, binding to a certain extent and they have even been described as 'Union quasi-legislation' whose exact relationship with both Community law and national law remains to be determined¹⁶³.

As third pillar instruments, joint actions are outside of the Community legal order, but naturally this does not exclude legal obligations arising under general international

¹⁶¹ [1996] OJ L322/7

¹⁶² [1997] OJ L63/2

¹⁶³ Anderson, et al, op cit., p 204.

law.¹⁶⁴ Meyring is of the opinion that even joint positions, although they may not be binding, derive legal effect from the principle of estoppel, which is applicable in inter-state relations.¹⁶⁵ At a minimum, the same must be true for joint actions. He also considers that the practice of specifying in joint actions a date for their entry 'into force' as evidence that they are to have legal effect and suggests that the provisions regarding joint actions in Article J.3(4) TEU may apply to joint actions taken under the third pillar, as it is a common technique of legislators not to repeat definitions of terms which have already appeared in the same text.¹⁶⁶ The Council of the European Union has also recently cited Article J.3(4) TEU as evidence of the legally binding effect of actions taken under the third pillar and this would also seem to be the view of the European Commission.¹⁶⁷

Meyring points to the objective of joint actions, the need to achieve real co-operation, and the procedural rules applying to their adoption as more convincing arguments for a legal effect, and also the fact that Member States tend to implement joint actions as if they were binding.¹⁶⁸ The result is that after joint positions, joint actions are the next step along the road to harmonisation, as they require states to take specific action in order to achieve a given objective.¹⁶⁹

Declarations, such as the Hague Declaration, are not mentioned in the TEU and would not appear to have any legal or binding status.¹⁷⁰ In this regard the latter shares a similar position with joint positions, the non-binding instruments which could be adopted under

¹⁶⁴ MEYRING, Bernd. *Intergovernmentalism and Supranationality: Two Stereotypes for a Complex Reality*. (1997) 22 *E.L.Rev.* 221, at page 232.

¹⁶⁵ *Ibid.* citing Brownlie, *Principles of Public International Law*, 4th ed. (1990), pp. 640-642. In this regard they are similar to agreements between States of the USA. See chapter three, *infra*.

¹⁶⁶ *Ibid.* page 233. The latter argument is rather unconvincing, as a reference to Article J.3(4) TEU could easily have been made in Article K.3 TEU.

¹⁶⁷ See opinion of Advocate General Fennelly in case C-170/96, *Commission v. Council (airport transit visas)* [1998] I-2765, paragraph 17. The Court did not decide on the issue. Certain Member States, the UK in particular, are of the opinion that a joint action is only binding if this is expressly stated in its text, see: EU: The "third pillar" and the 1996 IGC, *Statewatch*, July-August 1996, vol. 6, no 4.

¹⁶⁸ *Loc. cit.* pp 233-234.

¹⁶⁹ *Ibid.* p 235.

¹⁷⁰ Meyring, *loc. cit.*, p 235, considers that instruments 'hors nomenclature' must be regarded as joint positions or joint actions as far as they are to have any legal effect, as the Member States are obliged not to

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Article K3(2)(a) TEU. As the meeting at The Hague was not a formal Council meeting its conclusions were formalised as a declaration.¹⁷¹

2.5.2 Provisions of Current Instruments

*(a) The Declaration of the Hague Ministerial Conference.*¹⁷²

The objective of the Hague Declaration is stated to be to encourage further action in the field of prevention, investigation and prosecution, and appropriate assistance and support in line with the existing legal and budgetary frameworks and competences at national and European level, without prejudice to the obligations of Member States under the 1949 Convention and the 1979 Women's Convention¹⁷³.

The Declaration makes a large number of useful suggestions regarding international co-operation, prevention, investigation and prosecution and assistance and support to victims. For the time being the Declaration remains just that, a declaration without any legally binding authority. It may well be, however, that much of its content will find its way into more binding EU texts in the future.

(b) The Joint Action of 24 February 1997.

In the context of trafficking in women, the joint action of 24 February 1997 is the only EU instrument which imposes obligations upon the Member States, as neither the STOP joint action nor the Hague Declaration concern specific action which a Member State is

conclude agreements on third pillar issues outside of the structure of Title VI TEU. This would indeed seem to be the position under Article K.7 TEU.

¹⁷¹ The meeting at The Hague was a 'ministerial conference' held on the initiative of the Dutch Presidency of the EU.

¹⁷² The Hague Ministerial Declaration on European guidelines for effective measures to prevent and combat trafficking in women for the purpose of sexual exploitation, 26th April 1997.

¹⁷³ The Hague Declaration, point I.

bound to undertake. When looking at this instrument in the context of the criticisms made of current international treaties, we can make certain observations.

Firstly, the enforcement of international treaties is something problematic. The extent of the legal force of the joint action is unclear, however. Title IV of the joint action stipulates that the Council shall review the fulfilment by the Member States of their obligations by the end of 1999.¹⁷⁴ As an action for enforcement may not be possible, presumably the only sanction for non-compliance will be the traditional one of international law: embarrassment.¹⁷⁵

As part of the joint action, the Member States undertake to review their legislation concerning trafficking and the sexual exploitation of children, “with a view to providing that”, trafficking offences are classified as criminal offences and are punishable by, “effective, proportionate and dissuasive criminal penalties”. These penalties are to include custodial sentences (which may involve extradition), confiscation of assets and closure of establishments.¹⁷⁶

An important feature under Title II A. (f) is the undertaking by each of the Member States to ensure that its authorities are competent regarding these offences where the offence is committed on its territory, or where the person committing the offence is a national or a habitual resident in its territory. As the Member States may require double criminality¹⁷⁷ in order to invoke this provision (although this requirement is to be kept under review¹⁷⁸) and the Member States may provide that they will only exercise this jurisdiction where extradition of the person accused is not viable,¹⁷⁹ this provision is

¹⁷⁴ It was agreed at the informal JHA Council in October 1998 to bring the date for fulfilment of the Member States’ obligations forward, COM (1998) 726 final p11, but it seems that few Member States will have implemented the legislation necessary before the end of 1999.

¹⁷⁵ Embarrassment is specifically provided for in a Council declaration appended to the joint action on participation in criminal organisations as Member States who have not implemented the joint action by the date specified must explain to the Council why implementation has been delayed, [1998] OJ L351/3.

¹⁷⁶ The joint action is not any more specific about the penalties to be imposed.

¹⁷⁷ Title II B.

¹⁷⁸ Title II C, in relation to third countries who have not adequately implemented Article 34 of the Convention on the Rights of the Child. Dual criminality would not be an obstacle where the offence is committed within the EU as all Member States have undertaken to criminalise the offences in question.

¹⁷⁹ Title II D.

somewhat weakened. Finally, Title II F. (a) requires the Member States to provide for the protection of witnesses in accordance with the resolution of the Council on the protection of witnesses¹⁸⁰.

Turning to the obligations of the Member States under international law, Title III B. requires the Member States which have a reservation under Article 5 of the European Convention on Mutual Assistance¹⁸¹ to review it, although they are not required to withdraw it.

With regard to the redress of a victim of trafficking, Title II F. (b) provides that the Member States shall ensure that the victims of the offences “are given the appropriate assistance to enable them to defend their interests before the Courts”. While it is not clear whether this is to apply in the context of criminal proceedings only or also to civil proceedings, the Hague Declaration provides some clarification on this point.¹⁸²

(c) Discussion.

We have looked at why the EU might be interested, what action it has taken so far and the legal effect of the instruments used to date. The only action taken so far, which could be considered to be a legal instrument on trafficking in women, as we have seen, is the joint action of the 24th February 1997. The joint action is similar to international instruments in that dual criminality, for example, is still provided for although its necessity is questioned. An important difference between the joint action and more traditional international instruments is to be found in Title VI of the joint action, entitled ‘Commitment and follow-up’, as it is precisely a lack of ‘follow-up’ which undermines instruments such as the 1949 Convention.

¹⁸⁰ Resolution of the Council of the European Union of 23 November 1995 on the protection of witnesses in the fight against organized crime, [1995] OJ C327/5.

¹⁸¹ (1959) Article 5 provides that states parties may enter reservations on the execution of letters rogatory on the basis of a dual criminality requirement or that the offence in question be an extraditable one.

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It would seem that the Member States are obliged to implement the joint action by the end of 1999, although there is no provision for enforcement should they fail to do so. Nevertheless the 'sanction' of embarrassment is built into the joint action, as no Member State will want to be found to be 'dragging its heels' when the Council assessment falls due.

Moreover, the assessment to be carried out by the Council tells us that the joint action is not expected to be a solution to the problem, but rather a step on the way towards a solution. The next section will examine the options for a binding legal instrument for the suppression of trafficking in women.

2.6 A New Initiative by the Union ?

There are several possible routes by which a new instrument on trafficking in women could be developed at EU level. The entry into force of the Treaty of Amsterdam has also provided the EU with wider competence and new instruments, as will be seen. The following options will be considered; (1) a measure under the first pillar, (2) a third pillar measure, (3) closer co-operation between certain Member States, and (4) measures to promote action at an international level through the Community or the Presidency of the EU. For each of these options it is appropriate to examine what type of measures may be taken and the advantages and disadvantages of these.

¹⁸² Point III.2.1 of the Hague Declaration states that Member States are to "enable victims of trafficking in women to defend their interest during criminal proceedings" and under point III.3.2 Member States are to ensure access to civil action against the offender for compensation to victims of trafficking in women".

2.6.1. The First Pillar: The Treaty establishing the European Community

(a) *The Competence of the Community.*

It is generally agreed that the European Community lacks the competence to prescribe criminal offences or to enforce any such sanctions.¹⁸³ The EC legislature cannot expressly require Member States to enforce certain provisions by criminal sanctions.¹⁸⁴ Although regulations have resulted in criminal penalties being applied in the past this is controversial.¹⁸⁵ Directives on the other hand definitely cannot be used for this purpose.¹⁸⁶ Even as regards breaches of Community rules by individuals, as when the Community is defrauded, the resultant penalties imposed by the virtue of the relevant Community instruments are classed as administrative sanctions¹⁸⁷ although such breaches may also be regarded as criminal offences under the laws of the Member States. Thus, as will be shown, the harmonization of criminal laws is much more likely to take place as a result of the measures set out in Title VI of the TEU.

¹⁸³ Anderson, et al, op cit., p 182.

¹⁸⁴ Lensing, loc. cit., p 224. However, in *Federal Republic of Germany v. Commission Advocate-General Jacobs* was of the opinion that "Certainly, in its current state, the Community law does not confer upon the Commission (nor upon the trial court or the Court of Justice) the functions of a criminal court. One must note, however, that that does not stop the Community from exercising powers permitting it, for example, to harmonise the criminal laws of the Member States if that should be necessary to achieve one of the objectives of the Community." Case C-240/90 [1990] ECR I-5383.

¹⁸⁵ Bridge refers to four regulations which required the Member States to impose penalties for their breach and which resulted in criminal penalties being imposed in the UK. These were the Marketing standard of eggs regulation (1619/68) [1968] OJ L258/1, the road transport regulation (543/69) [1969] OJ L77/49, the customs formalities regulation (542/69) [1969] OJ L77/1, and the community surveys of salaries and wages regulations (2259/71) [1971] OJ L238/1 and (2395/71) [1971] OJ L249/52. BRIDGE. *The European Communities and Criminal Law*. [1976] *Crim. L.R.* 88. None of these regulations would seem to require that the penalty imposed be a criminal one, although the regulation 2395/71 states that the laws in the Member States on statistical surveys shall apply. In effect this is specifying the penalties which are to apply. In addition the concept of administrative sanctions is virtually unknown to the legal systems in Denmark, Ireland and the UK and consequently penalties are criminal.

¹⁸⁶ The ECJ held that criminal liability cannot be based solely on the provisions of a directive, even where a Member State has failed to implement a directive on time, case 14/86, *Pretore di Salò v. persons unknown* [1987] ECR 2565 and case 80/86 *Kolpinghuis Nijmegen BV* [1987] ECR 3969.

¹⁸⁷ Case C-240/90, *Germany v. Commission*, *supra*. The European Commission on Human Rights has held, however, that administrative sanctions (similar to those imposed by the Commission) imposed by a French national authority did, in fact, amount to the disposal of a criminal charge: *Société Stenuit v. France* (1992) 14 EHRR 509.

Nevertheless, Community instruments have been used to address criminal matters. The EC Council Directive No. 91/308 on money laundering¹⁸⁸ is a good example. This directive was adopted under the then Articles 57(2) and 100a EC (now Articles 47(2) and 95 respectively). Article 47(2) EC concerns the co-ordination of provisions concerning self-employed persons, while Article 95 EC provides for the taking of measures for the approximation of provisions concerning the internal market, and 'balanced progress in all the sectors concerned'.¹⁸⁹

The money laundering directive does not go as far as to specify that money laundering be considered a criminal offence, however. This was proposed in the draft directive¹⁹⁰ but in the final version of the directive Member States were required to "ensure that money laundering as defined in this Directive is prohibited".

Had the directive specified that criminal sanctions were to be applied, the discretion of the Member States on how to implement the directive would have been reduced to 'vanishing point'.¹⁹¹ It was perfectly clear what was required of the Member States, however. Article 14 of the directive obliged the Member States to 'determine the penalties for infringement of the measures adopted pursuant to the directive' and, in addition, the Member States appended a statement to the directive in which they undertook to enact criminal legislation.¹⁹² The directive thus demonstrates determination of the Member States to avoid the appearance of any trace of Community competence in criminal matters.¹⁹³

¹⁸⁸ EC Council Directive No. 91/308 of 10 June 1991 on Prevention of the Use of the Financial System for the Purpose of Money Laundering, [1991] OJ L166/77.

¹⁸⁹ As per Article 14 EC.

¹⁹⁰ [1990] OJ C106/6, Article 2 of which read "Member States shall ensure that money laundering of proceeds of any serious crime is treated as a criminal offence according to their national legislation."

¹⁹¹ DINE, Janet. *European Community Criminal Law* ? [1993] *Crim. L. R.* 247.

¹⁹² [1991] OJ L166/83. The directive on control of the acquisition and possession of weapons uses similar language in obliging Member States to 'prohibit' certain acts (Article 14) and to introduce penalties for failure to comply (Article 16). The provisions of Articles 7 and 8 of the directive read more like those of a criminal statute, however. [1991] OJ 256/51.

¹⁹³ SALAZAR, Lorenzo. *The European Community and criminal law – an obstacle course*. IN: DELMAS-MARTY, Mireille (ed.). *What kind of criminal policy for Europe ?* The Hague: Kluwer law international, 1996. (Delmas-Marty: 1996) p 42.

The new Title IV of the EC Treaty¹⁹⁴ covers visas, asylum, immigration and other policies related to free movement of persons. Article 61(a) EC provides that in order to establish progressively an area of freedom, security and justice, the Council is to adopt measures aimed at ensuring the free movement of persons and flanking measures with respect to external border controls, asylum and immigration and measures to prevent and combat crime in accordance with the provisions of Article 31(e) of the Treaty on European Union.

Other measures to be adopted under Article 61 EC include those aimed at safeguarding the rights of nationals of third countries (Art. 61(b)EC) and measures in the field of police and judicial cooperation in the context of tackling crime in accordance with the provisions of the TEU (Art. 61(e)EC).

Also of importance for our discussion are the provisions of Article 62(1) EC which stipulates that measures are to be adopted with a view to ensuring the absence of any controls of persons when crossing state borders within the Union,¹⁹⁵ and the provisions of Article 61(2) EC under which the Council is to adopt measures on the crossing of external borders including rules on visas for intended stays of no more than three months.¹⁹⁶ Article 61(3) EC requires measures setting out the conditions under which nationals of third countries may travel within the Union for periods up to three months.

The trafficking in women is prohibited under international law. It follows that any action by the EC must combat trafficking. How could it do this if it does not have competence in criminal matters ? An argument would have to be made that trafficking in women somehow has negative repercussions on a policy area within the competence of the Community. Just as the money laundering directive thus uses a Community path to get to

¹⁹⁴ Article 69 provides that the application of this Title shall be subject to the various Protocols of the United Kingdom, Ireland and Denmark and without prejudice to the Protocol regarding the application of Article 14 to the UK and Ireland.

¹⁹⁵ Such measures are to be in compliance with Article 14 which defines the internal market as comprising "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured".

¹⁹⁶ It will be recalled from chapter one that victims of trafficking may enter the EU legally using short term visas.

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its objective – the criminalisation of money laundering - an instrument dealing with trafficking in women would similarly have to be of relevance to the first pillar. There are several different legal bases which could be used, either utilising the new competences to be found in Title IV EC or the more traditional policy areas of the Community. In this context it is a well established fact that whenever the Council believes that a particular field must be brought into the Community sphere, enough points of connection can be found.¹⁹⁷

Firstly, such an argument might be made as follows: Traffickers prey on the ambitions of young women who wish to migrate within the Union. This is an abuse of the free movement of persons and indeed represents a threat to this fundamental freedom guaranteed by Article 14 EC. Action to ensure that Member States adopt provisions preventing such an abuse is therefore justified. This protection could also be seen as one of the flanking measures referred to in Article 61(a) EC with respect to immigration into the Union and Article 61(b) EC could be used to protect third country nationals. The matter of sanctions against offenders is to be left to the Member States, but the ECJ may ensure that any sanctions are at least as deterrent as sanctions against similar activity within the Member States.¹⁹⁸

This may be seen as a strained legal basis. On the other hand there are many instances of Community action where the legal basis for action is less than clear, the money laundering directive being an example of this. The ECJ has also held that, when citizens of one Member State are visiting another Member State, they must enjoy the same amount of protection against physical violence as citizens of the latter state.¹⁹⁹ Given the link between immigration into the EU generally and trafficking in women it is submitted that Title IV EC gives the Community competence to address this problem.

¹⁹⁷ SEVENSTER, Hanna G. *Criminal Law and EC Law*. (1992) 29 *CMLRev.* 29, at p 69.

¹⁹⁸ Case 68/88, *Commission v. Hellenic Republic* [1989] ECR 2965. The role of the Court is discussed further below.

¹⁹⁹ This decision was based on the Treaty Articles providing for the free movement of persons, the provision of services and the right to freedom from discrimination on grounds of nationality (Articles 39

Secondly, prostitution is not illegal and is recognised as a form of 'work' in certain Member States. Indeed, it is, de facto, 'labour' which is engaged in by women and men in every Member State of the Union. The Community could therefore seek to take action using its competence in the areas of free movement of workers or the freedom to provide services.²⁰⁰

The possibility of the Community seeking to regulate the 'workplace' of prostitutes under Article 137 EC is not entirely removed from reality. The ECJ has decided that the freedom of movement of workers contained in Article 39 EC applies to prostitutes, who may not be excluded from benefiting from this provision by virtue of the public policy exceptions, contained in Articles 39 and 46 EC, if prostitution, by nationals of the Member State of destination, is not repressed or combated genuinely in the territory of that state.²⁰¹ It should be noted, however, that the Court did not go as far as to say that it regards prostitution as 'work', preferring to focus on the limitations to the public policy exceptions referred to.²⁰²

If the Community were to adopt the position that the migration of prostitutes and/or the working conditions of prostitutes was an issue which needed to be addressed, a measure obliging the Member States to 'prohibit' (read criminalise) abuses such as trafficking and the use of coercion, etc. would be the outcome. There are of course many arguments why this approach would not be possible, the objection on the grounds of differing standards of morality in the Member States being one of them.²⁰³ Moreover, as should be clear

and 59 and ex-Article 7, now repealed). Case 186/87 *Ian William Cowan v. Tesoir Public* [1989] ECR 195.

²⁰⁰ Article 49 EC and Article 54 EC may prevent Member States, in which, prostitution is viewed as 'work' prohibiting prostitutes from other Member States from establishing themselves on their territory. Action to prevent abuse of this freedom is certainly justified.

²⁰¹ Cases 115 and 116/81, *Rezguia Adoui v. Belgian State and City of Liège; Dominique Cornuaille v. Belgian State* [1982] ECR 1665, at page 1708.

²⁰² Although it certainly could have as the Court claims ultimate authority to define the meaning and scope of the term 'worker' which it will construe broadly, see CRAIG, Paul and DE BÚRCA, Gráinne. *EU Law Text, Cases, and Materials*. 2nd ed., Oxford: Oxford University Press, 1998. P 674. This would require the ECJ to find that prostitution is a 'genuine economic activity', case 53/81, *Levin v. Staatssecretaris van Justitie* [1982] ECR 1035. Given the stance taken on prostitution by the Netherlands and Denmark the possibility of the Court having to decide on this question is not remote.

²⁰³ This reason cited by the UK in a case concerning the importation of pornography; case 34/79, *R. v. Henn and Darby* [1979] ECR 3795

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from the discussion on prostitution in chapter one, it is very unlikely that the requisite political will to take this course of action exists.

Article 42 TEU provides that the Council, acting unanimously, may decide that action in areas referred to in Article 29 TEU shall fall under Title IV of the Treaty establishing the European Community. This is very significant as it would allow the 15 to use Community Instruments to pursue the objectives of the Union - which are to be attained by combating trafficking of persons, amongst other things, through closer cooperation of various national authorities and through the approximation of rules on criminal matters in the Member States.²⁰⁴ There is a clear functional overlap between Community law affecting the free movement of persons and the policy issues addressed in the third pillar. Any conflict between action taken under these pillars should be resolved in favour of the Community measures as Article 29 TEU states that the Union's objective is 'without prejudice to the powers of the European Community'.²⁰⁵ This would be an argument in favour of utilising the Article 42 TEU procedure.

The approximation of laws provided for, however, seems to be limited to those crimes set out in Article 31(e) TEU which are organised crime²⁰⁶, terrorism and illicit drug trafficking. This may be a somewhat literal reading of the Articles in question, but if it is correct then Article 42 TEU may be less relevant in the context of trafficking particularly where organised crime is not involved.²⁰⁷

²⁰⁴ Article 29 TEU is discussed in further detail below in the following section.

²⁰⁵ Anderson, et al, op cit., p 210.

²⁰⁶ The Council has adopted a joint action on making it a criminal offence to participate in a criminal organisation in the Member States of the EU, Article 1 of which defines a 'criminal organisation' as a structured association, established over a period of time, of two or more persons, acting in a concerted manner with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, whether such offences are an end in themselves or a means of obtaining material benefits and, where appropriate, of improperly influencing the operation of public authorities. [1998] OJ L351/1.

²⁰⁷ Conversely, the preamble to the joint action on trafficking states "Whereas trafficking of human beings and sexual exploitation of children may constitute an important form of international organised crime". In addition the Council and the Commission are of the opinion that trafficking in persons is a 'prime candidate' for approximation of laws under the TEU. Action plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice. [1999] OJ C19/1 point 46(a).

Wash. D.C.

Feb. 10, 1964

Dear Mr. [Name]

Thank you for

your letter of

Jan. 29, 1964.

I am sorry

that I cannot

reply to you

more quickly.

I am sure

that you will

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Alternately, if the Article 42 TEU procedure were to be used, it would give the Community competence to act on penal matters. This would be a new departure for the EC as the use of this provision would communitarise the criminal law in the fields outlined in Article 29 TEU. This is so as the impact of EC instruments on national law is far different from that of either third pillar or international instruments. These instruments will be considered in the following sections.

(b) Community Instruments.

Article 249 EC sets out the various forms of Community legislation – these being regulations, directives, decisions, recommendations and opinions. As regulations and directives are the ‘harder’ forms of Community legislation (at least as far as the Member States are concerned) it will only be necessary to consider these further.

Regulations have general application, are binding in their entirety and have direct effect. They do not need to be implemented by national measures, and indeed, Member States should not introduce such measures²⁰⁸. One advantage of regulations is that under Article 229 EC the ECJ may be given unlimited jurisdiction with regard to the penalties provided for by such regulations, pursuant to the provisions of that Treaty. The Commission Legal Service is said to be of the view that this Article gives the Community authority to impose punitive sanctions, although it has been noted that it is unlikely that this Article purports to confer general Community jurisdiction in criminal matters²⁰⁹.

Directives, on the other hand, are binding as to the result to be achieved, but leave the choice of form and methods to the national authorities of the Member States. Directives, therefore, generally require implementing legislation and, given that they allow for different legal situations in the Member States, are particularly useful for harmonizing laws in certain areas. Further, directives generally do not have direct effect, although it will be recalled that a directive may be held to have vertical direct effect by the ECJ,

²⁰⁸ Case 34/73, *Variola v. Amministrazione delle Finanze* [1973] ECR 981.

²⁰⁹ Anderson, et al., op cit., p 192.

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particularly when it is clear and precise and a Member State has failed to implement it²¹⁰ or where it has been implemented incorrectly.²¹¹ Article 94 EC specifies that Directives are to be used to 'approximate laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market', but, as has been established, they may not be used to impose criminal liability. Both regulations and directives contain a deadline for their entry into force.²¹²

(c) Enforcement of EC Instruments.

Article 230 EC mirrors the rights of states parties to bring an action against one another under international law, this type of action being somewhat infrequent. However, the unique supranational character of the Community allows the Commission to take actions against the Member States who have failed to live up to their obligations by way of the Article 226 EC procedure, in contrast to the international situation. Thus failure to abide by a regulation or failure to implement a directive become actionable after the date of their entry into force. The individual complaints lodged with the Commission²¹³ under this latter Article also being one outlet through which individuals who consider that a Member State is in breach of its obligations may seek to have the matter rectified.

At national level the *Francovich*²¹⁴ case has determined that Community law may require national courts to grant the remedy of damages in favour of an individual who has suffered loss as a result of the failure of a Member State to properly implement a Community directive.

The ECJ has held that a Member State will be in breach of its obligations under Article 10 EC if it fails to penalise those who infringe Community law in the same way as those

²¹⁰ Case 8/81, *Becker v. Finanzamt Münster-Innenstadt* [1982] ECR 53.

²¹¹ Case 51/76, *Verbond van Nederlandse Ondernemingen v. Inspecteur der Invoerrechten en Accijnzen* [1977] ECR 113.

²¹² Article 254(1) EC.

²¹³ Although the Commission has complete discretion as to whether to act on such complaints, case 4/69, *Alfons Lütticke GmbH v. Commission* [1971] ECR 325.

who infringe national law even though the Community measure in question does not specifically provide any penalty or refers for that purpose to national laws²¹⁵. Further a Member State may be in breach if it fails to prevent action by other parties which is frustrating Community objectives.²¹⁶ This would be a very effective way of ensuring that a Member State enforced the provisions of a Community instrument on trafficking.

2.6.2. The Third Pillar: The Treaty on European Union

(a) The Scope of the Third Pillar.

The Treaty of Amsterdam made certain important changes to the 'Third Pillar' as established by the Treaty on European Union. It transferred competence regarding much of the old third pillar to the community and also introduced new instruments for the remainder of the intergovernmental pillar.

The new Title VI of the Treaty on European Union has been renamed 'Provisions on Police and Judicial Cooperation in Criminal Matters'. Article 29 TEU states the objective of the Union as being 'to provide citizens with a high level of safety within an area within an area of freedom, security and justice'. This is to be achieved by 'preventing and combating crime, organised or otherwise, in particular...trafficking in persons and offences against children' through closer cooperation of police, customs, judicial and other competent authorities as well as through the approximation of rules on criminal matters, in accordance with the provisions of Article 31(e) TEU.

(b) Third Pillar Instruments.

The following instruments are provided for by Article 34 TEU:

²¹⁴ Case No. C-6/90 and 9/90, *Andrea Francovich & Bonifaci v. Italy* [1991] ECR I-5357. Also C-46/93 and C-48/93 *Brasserie du Pêcheur SA v. Germany*, and *R. v. Secretary of State for Transport, ex parte Factortame Ltd. and others* [1996] ECR I-1029.

²¹⁵ Case 68/88, *Commission v. Hellenic Republic* [1989] ECR 2979.

- (a) Common Positions which define the approach of the Union to a particular matter
- (b) Framework Decisions which are for approximating laws and regulations of the Member States and are binding as to their result but leave the form and methods to the national authorities. They shall not have direct effect, however.
- (c) Decisions for any other purpose other than those covered by Framework Decisions. Such decisions are binding but shall not entail direct effect.
- (d) Conventions which Member States shall adopt in accordance with their respective constitutional requirements and which shall enter into force once half of the Member States have adopted them, for those Member States, unless otherwise provided.

These instruments may be adopted by the Council²¹⁷, unanimously, in promoting cooperation which contributes to the pursuit of the objectives of the Union (Art. 34(2) TEU), which, as we have seen, are to be achieved by the prevention of trafficking in persons and offences against children, amongst other things.

(c) Convention or Framework Decision ?

Of particular interest in the context of the present subject matter are Conventions and Framework decisions.

Article 35 TEU, discussed below, allows the ECJ to interpret framework decisions and conventions and to decide on the validity and interpretation of measures implementing conventions. There is no provision for bringing an action for enforcement against Member States who have not complied with their obligations although presumably one

²¹⁶ Case C-265/95, *Commission v. France* [1997] ECR I-6959.

²¹⁷ Article 39 TEU obliges the Council to consult the European Parliament before adopting framework decisions, decisions or conventions.

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Member State could seek to enforce the provisions of one of these instruments against another Member State. Although unlikely, this would be one route open to a Member State which is experiencing an upsurge in trafficking as a result of the non-compliance of another Member State with an anti-trafficking instrument.

While conventions were possible under Article K3(2)(c) TEU before the Treaty of Amsterdam came into effect, this type of instrument was not used to address trafficking.²¹⁸ Conventions are international treaties and thus they tend to have the disadvantage of lengthy ratification procedures at national level²¹⁹ and the sometimes large number of reservations and declarations attached to them – so that they meet the ‘constitutional requirements’ of the states concerned. Some of the delays in implementing conventions have been circumvented by Article 34(d) as they will now enter into force once half of the Member States have adopted them. Needless to say, under the TEU conventions do not enjoy direct effect. Meyring points out, however, that under certain circumstances, traditional international treaties are directly applicable and that there is no reason to doubt that this applies *a fortiori* to third pillar instruments.²²⁰

Framework decisions may be compared to directives under the first pillar, although they do not entail direct effect as this has been specifically excluded by Article 34(1)(b) TEU. They will, however, have the advantage (compared to conventions) of not having qualifying documents attached to them and as they are intended to approximate laws they should be more precise than conventions. Further as directives normally specify a period for implementation, this practice may also be followed for framework decisions, although there is no obligation to do so under the TEU.²²¹ Although framework decisions are similar to directives, in that they are binding as to their effect, the Commission is not given the right to take an action for non-implementation of framework decisions. Where a

²¹⁸ In adopting the report by Mrs. Susan Waddington on the Commission's first Communication on trafficking (COM (96) 567 final) the European Parliament called for a Convention to be established based on Articles 29 and 34 TEU, [1998] OJ C14/25.

²¹⁹ Although Article 34(d) TEU stipulates that the Council may set a limit within which the Member States must begin these procedures.

²²⁰ Meyring, loc. cit., p 240.

²²¹ Indeed the provisions on the entry into force of Community instruments were specifically excluded from Article 41(1) TEU.

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Member State implements a framework decision incorrectly, this may be rectified by way of a preliminary ruling by the ECJ, provided such a reference is made. But what about if a Member State does not implement a framework decision at all? Whether the ECJ will be willing to extend the notion of a state's liability, based on the *Francovich* and *Brasserie du Pêcheur* cases remains to be seen.²²²

The third pillar currently seems better placed to encourage convergence of criminal laws in the EU than the supranational EC, this being the purpose of this pillar. The major limitation of the Title VI provisions, however, is that they are aimed at improving co-operation between national systems, not at unifying them. Thus the European Union remains far from the situation where it might contemplate the establishment of a 'European Criminal Court' to try 'Community' or 'Union' crimes.²²³ This is a theme to which we shall return in chapter three.

Nevertheless, the provisions of the third pillar represent a significant improvement on those of international law. Due to the level of integration and co-operation which exists among the 15, a third pillar instrument could be far more ambitious and achieve a far greater level of harmonisation than a UN or Council of Europe initiative. The level of compliance with any such initiative by the Member States is also likely to be higher, despite the absence of enforcement provisions, as the normative 'pull' towards compliance within the EU is stronger.

2.6.3. Closer Co-operation between certain Member States.

This is a course of action open to those Member States who wish to co-operate more closely on certain issues, although some Member States are not willing to do so. This not uncontroversial provision introduces 'flexibility' into the treaties and is an attempt to

²²² Supra.

²²³ Anderson, et al, op cit., p 215.

avoid the difficulties which have arisen in the past when certain Member States were opposed to furthering integration.²²⁴

Article 40 TEU and Article 11 EC provide that where at least a majority²²⁵ of Member States wish to establish closer co-operation between themselves they may be authorised to make use of the institutions, procedures and mechanisms laid down by the Treaties in order to do this, provided the conditions contained in Articles 40, 43 and 44 TEU and Article 11 EC are complied with. This mechanism allows those Member States who wish to pursue integration, further than certain other Member States are prepared to participate, to do so without being hampered by objections on principle to European Integration.²²⁶

Were a situation to arise where the Council found itself deadlocked with a majority of Member States agreed on the content of an anti-trafficking measure but with a small number of Member States refusing to participate, the Article 40 TEU mechanism could prove quite valuable.

The instruments available to such a closer co-operation would be those under the first or third pillar, as discussed above, depending on whether the co-operation is based on Article 11 EC or Article 40 TEU.

The main disadvantage of this procedure is that not all Member States would be included in any initiative concluded, although the Member States not participating may, of course, decide to join at a later date. It would seem that an issue such as trafficking, which requires the co-ordination of the policies of all Member States in several policy fields for the very reasons discussed above is ill suited for the divergence in policies which may

²²⁴ Article K7 TEU (pre-Amsterdam Treaty) had provided that 'the provisions of this Title shall not prevent the establishment of closer cooperation between two or more Member States in so far as such cooperation does not conflict with, or impede, that provided for in this Title.'

²²⁵ Article 43 TEU.

²²⁶ A Member State who objects to the closer cooperation may only do so for 'important and stated reasons of national policy' (Art. 40(2) TEU) and even then can only require that the decision to grant or refuse authorisation be taken by the European Council and not by the Council acting by qualified majority. Art. 11 EC contains an identical provision.

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flow from any such measure. A unified approach would seem to be the best way of combating this crime.

This is not to say that closer cooperation could not be a very useful tool in the fight against trafficking in women. An instrument taken under the first or third pillars, encompassing all Member States, could be supplemented by another instrument adopted by a majority of Member States under the provisions on closer cooperation. Given the different approaches to the question of prostitution in the Union, a majority of Member States may wish to take action against all recruitment for prostitution, with states such as the Netherlands, Denmark and Germany preferring to focus on the aspect of coercion. This would avoid reducing all action between the Member States to the lowest common denominator of 'forced prostitution' while still uniting the divergent approaches.²²⁷

The above is just one example of how closer cooperation may be used, but clearly there will be many aspects of the investigation and prosecution of trans-border crimes which may benefit from this new possibility. It remains to be seen how the provisions on closer cooperation are put into effect, but if and when the provisions on closer co-operation are first used it will no doubt be controversial, whether this be in the context of trafficking in women or another issue. This is something we shall return to in chapter three, in the context of agreements between the states of the USA .

2.6.4. The EU in International Law.

Article 24 TEU, which is part of Title V on the Common Foreign and Security Policy, also applies to matters falling under Title VI.²²⁸ This article provides that the Council, acting unanimously, may authorise the Presidency to open negotiations regarding an

²²⁷ Hirsch, *op cit.*, has noted that the problems of harmonising the different approaches may be avoided if there is a consensus to combat international traffic in human beings and the exploitation of forced adult prostitution, at p 7.

²²⁸ This is stressed in Article 24 TEU and again in Article 38 TEU.

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1. *Chlorophyll a* (Chl *a*)

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$$r^* = \frac{2}{3} \quad \text{for } \alpha = 0, \quad \text{and} \quad r^* = \frac{1}{2} \quad \text{for } \alpha = 1.$$

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— *Journal of the American Medical Association*, 1997

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agreement with other States or international organisations. The Council may conclude such agreements by acting unanimously.²²⁹

Similarly, Article 300 EC provides that the Commission shall conduct negotiations of agreements between the Community and other states or international organisations where the Treaty provides for such agreements.²³⁰ Where competence on a particular issue is shared between the Community and the Member States, an international agreement concluded regarding this issue is referred to as a mixed agreement, although the Community may enter into the agreement without the Member States also being parties and *vice-versa*.²³¹

Thus there is clear competence at EC or EU level to act on the international stage.²³² This could lead to a situation where both the EC and TEU provisions would be used to co-ordinate the position of the EU in relation to an initiative, in the context of an international organisation, on trafficking in women.

An example of this approach can be seen in the context of the draft UN Protocol on trafficking which supplements the UN Convention against transnational organized crime²³³. It is the belief of the Commission that the Community has competence regarding certain matters arising under this Protocol as well as issues which fall under the

²²⁹ Although no agreement shall be binding on a Member State whose representative in the Council states that it has to comply with the requirements of its own constitutional procedure, the other Member States may agree that the agreement shall provisionally apply to them. Article 24 TEU.

²³⁰ Article 300 EC concerns the conclusion of agreements between the Community and non member-states or international organisations. Article 300(7) EC stipulates that agreements concluded under the conditions set out in the Article shall be binding on the institutions of the Community and on Member States.

²³¹ Craig and de Búrca, op cit., pp 117-118.

²³² But the EU does not have legal personality of its own, *ibid*. The Member States prefer to see the provisions of Articles 24 and 38 TEU as a confirmation of existing powers rather than a transfer of new competence and added a Declaration to the Amsterdam Treaty to this effect. BARRETT, Gavin. Justice and home affairs cooperation – an overview. IN: TONRA, Ben. Amsterdam – what the Treaty means. Dublin: Institute of European Affairs, 1997. Further, the Council recently tried to argue that the 'Presidency' of the Council is a separate institution from the Council itself. See CURTIN, Deirdre M. and DEKKER, Ige F. The European Union as a 'layered' International Organisation: institutional unity in disguise. IN: CRAIG, Paul and DE BÚRCA, Gráinne. The Evolution of EU Law. Oxford: Oxford University Press, 1999, text accompanying note 134.

²³³ Chapter one, *supra*.

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third pillar²³⁴. A possible result could be the adoption by the Union of a common position, under Article 34 (a) TEU, dealing with the third pillar issues with the EC adopting a parallel directive regarding matters negotiated by the Commission, under Article 300 EC.²³⁵

It was noted in the context of the third pillar instruments,²³⁶ that international treaties may sometimes entail direct effect. The ECJ has held that a provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable when the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measures.²³⁷ In addition the ECJ has also held that certain international agreements can be directly effective, particularly where they confer on citizens Community rights which may be invoked before the courts.²³⁸

2.7 The role of the European Court of Justice.

The ECJ may be seen as having different functions as regards the subject matter of this paper. Firstly, it is a forum for ensuring that Member States implement the legally binding instruments which they are party to. This aspect has been addressed in the preceding sections. It has been noted that there is no such possibility to enforce instruments under international law, such as the 1949 Convention.

The following section will focus on the role of the Court in interpreting the provisions of instruments and agreements adopted by the EU before looking at how the Court deals with sanctions against non-state parties for breaches of Community law. These are two

²³⁴ Interviews with Commission officials 8th June 1999.

²³⁵ International agreements are in general not self executing. The Commission may therefore seek to harmonise the implementation of such an agreement by the Member States by way of a directive.

²³⁶ *Supra*.

²³⁷ Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR 3719

²³⁸ Cases 21-24/72, *International Fruit Company v. Produktschap voor Groenten en Fruit* [1972] ECR 1219.

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more important elements in ensuring that the Member States of the Union share a common approach to common problems.

(a) Interpretation by the Court.

The ECJ may interpret the provisions of legal instruments adopted under the treaties by virtue of Article 234 EC, Article 35 TEU²³⁹ and also of agreements concluded with non member states or international organisations, where such agreements so provide.²⁴⁰ While the jurisdiction of the Court to interpret third pillar instruments is dependant on the acceptance of this by the Member States, in practice it would be difficult politically for the Member States to exclude the role of the Court and it will therefore be assumed that the Member States will not seek to do this. Indeed one of the stronger points of EU measures is that they benefit from a uniform interpretation by the ECJ, an advantage which would be lost were the role of the Court to be excluded.

Where there is no mechanism for a single authoritative and binding interpretation the unilateral interpretation by national courts of provisions in inter-state agreements can defeat the objective of unification.²⁴¹ Interpretation by the ECJ of the law naturally ensures that there is a uniform interpretation of the law throughout the Community.²⁴²

²³⁹ According to Article 35(1) TEU the ECJ may be requested by the Courts of a Member States to give preliminary rulings on the validity and interpretation of framework decisions and decisions, and on the interpretations of Conventions and the measures implementing them provided that Member State in question has declared that it accepts the jurisdiction of the Court to give such rulings (pursuant to Article 35 (2) and (3) TEU). The Court may also rule on any dispute between Member States regarding the interpretation of any of the instruments adopted under Article 34(2) TEU, whenever such a dispute cannot be resolved by the Council within six months and shall have jurisdiction to rule on any dispute between the Commission and the Member States on the interpretation of Conventions established under Article 34(2)(d) TEU (Article 35(7) TEU). The jurisdiction of the Court to review operations carried out by the police or other law enforcement agencies or the exercise by Member States of their responsibilities related to the maintenance of law and order and internal security (Article 35(5) TEU). The ECJ also has jurisdiction to review the legality of framework decisions and decisions in actions brought by a Member State or the Commission only (Article 35(6) TEU).

²⁴⁰ Cappelletti, et al (eds.), op cit., p 220. In certain circumstances the ECJ may have inherent jurisdiction to review international instruments; "Before the incompatibility of a Community measure with a provision on international law can affect the validity of that measure, the Community must first or all be bound by that provision." Cases 21-24/72 *International Fruit Company*, supra, paragraph 7.

²⁴¹ Cappelletti, et al., ibid.

²⁴² "Article 177 is essential for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all states of the

The diagram illustrates a two-dimensional lattice structure. It consists of a grid of points. Arrows indicate interactions between nearest and next-nearest neighbors. The lattice is labeled with 'a' for the nearest neighbor distance and 'b' for the next-nearest neighbor distance.

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 3. *Chlorophyll c* (Chl *c*)
 4. *Chlorophyll d* (Chl *d*)
 5. *Chlorophyll e* (Chl *e*)
 6. *Chlorophyll f* (Chl *f*)
 7. *Chlorophyll g* (Chl *g*)
 8. *Chlorophyll h* (Chl *h*)
 9. *Chlorophyll i* (Chl *i*)
 10. *Chlorophyll j* (Chl *j*)
 11. *Chlorophyll k* (Chl *k*)
 12. *Chlorophyll l* (Chl *l*)
 13. *Chlorophyll m* (Chl *m*)
 14. *Chlorophyll n* (Chl *n*)
 15. *Chlorophyll o* (Chl *o*)
 16. *Chlorophyll p* (Chl *p*)
 17. *Chlorophyll q* (Chl *q*)
 18. *Chlorophyll r* (Chl *r*)
 19. *Chlorophyll s* (Chl *s*)
 20. *Chlorophyll t* (Chl *t*)
 21. *Chlorophyll u* (Chl *u*)
 22. *Chlorophyll v* (Chl *v*)
 23. *Chlorophyll w* (Chl *w*)
 24. *Chlorophyll x* (Chl *x*)
 25. *Chlorophyll y* (Chl *y*)
 26. *Chlorophyll z* (Chl *z*)
 27. *Chlorophyll aa* (Chl *aa*)
 28. *Chlorophyll ab* (Chl *ab*)
 29. *Chlorophyll ac* (Chl *ac*)
 30. *Chlorophyll ad* (Chl *ad*)
 31. *Chlorophyll ae* (Chl *ae*)
 32. *Chlorophyll af* (Chl *af*)
 33. *Chlorophyll ag* (Chl *ag*)
 34. *Chlorophyll ah* (Chl *ah*)
 35. *Chlorophyll ai* (Chl *ai*)
 36. *Chlorophyll aj* (Chl *aj*)
 37. *Chlorophyll ak* (Chl *ak*)
 38. *Chlorophyll al* (Chl *al*)
 39. *Chlorophyll am* (Chl *am*)
 40. *Chlorophyll an* (Chl *an*)
 41. *Chlorophyll ao* (Chl *ao*)
 42. *Chlorophyll ap* (Chl *ap*)
 43. *Chlorophyll aq* (Chl *aq*)
 44. *Chlorophyll ar* (Chl *ar*)
 45. *Chlorophyll as* (Chl *as*)
 46. *Chlorophyll at* (Chl *at*)
 47. *Chlorophyll au* (Chl *au*)
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 53. *Chlorophyll aza* (Chl *aza*)
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 55. *Chlorophyll acz* (Chl *acz*)
 56. *Chlorophyll adz* (Chl *adz*)
 57. *Chlorophyll aez* (Chl *aez*)
 58. *Chlorophyll afz* (Chl *afz*)
 59. *Chlorophyll agz* (Chl *agz*)
 60. *Chlorophyll ahz* (Chl *ahz*)
 61. *Chlorophyll aiz* (Chl *aiz*)
 62. *Chlorophyll ajz* (Chl *ajz*)
 63. *Chlorophyll akz* (Chl *akz*)
 64. *Chlorophyll alz* (Chl *alz*)
 65. *Chlorophyll amz* (Chl *amz*)
 66. *Chlorophyll anz* (Chl *anz*)
 67. *Chlorophyll aoz* (Chl *aoz*)
 68. *Chlorophyll apz* (Chl *apz*)
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Thus jurisdiction of the Court to give preliminary rulings would ensure that a measure on trafficking in women is interpreted in the same way in each Member State. Recalling the discussion in chapter one on the definition of 'sexual exploitation', a preliminary ruling might result in a uniform definition of this ambiguous term.

While the Court has the last word on the interpretation of Community law, however, it may not always have the last word on its effect. This is because it falls to the Member State courts to apply Community law and to give effect to the Court's rulings.²⁴³

(b) Sanctions for breaches of Community law.

As was discussed above, sanctions for breaches by private persons of Community measures may not be specified by the Community. In 1977, the ECJ held that in the absence of applicable Community sanctions, Member States may choose the penalties they see fit to correct non-observation of Community regulations by private persons.²⁴⁴ This principle was later refined, however, to specify that "the penalties laid down may not be disproportionate to the public security aim pursued"²⁴⁵ and more specifically the Court held that "...whilst the choice of penalties remains within their discretion, they must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive."²⁴⁶

The importance of the Court's function regarding sanctions has been summarised as follows;²⁴⁷

Community." Case 166/73, *Rheinmühlen-Düsseldorf v. Einfuhr – und Vorratsstelle für Getreide und Futtermittel*, [1974] ECR 33, at page 38.

²⁴³ Also because, in contrast with a federal system, the State courts are of co-ordinate jurisdiction, not inferior courts. Cappelletti, et al (eds.), op cit., pp 233-234.

²⁴⁴ Case 50/76, *Amsterdam Bulb* [1977] ECR 137.

²⁴⁵ Case C83/94, *Peter Leifer* [1995] ECR I-3231, footnotes omitted.

²⁴⁶ Case 68/88, *Commission v. Hellenic Republic* [1989] ECR 2965, at 2985.

²⁴⁷ Lensing, loc. cit., p 223.

“It seems that assimilation with national law is a minimum requirement: it takes second place to the requirement that the penalty be effective and proportionate. That means that eventually it is for the Court of Justice to assess whether the enforcement through the national criminal law of provisions of EC law is effective and proportionate.”

And

“Since there are large divergences in the level of enforcement of provisions of EC law by the Member States, the Court might in this manner seek to harmonize and enhance the enforcement level of the Member States.”²⁴⁸

2.8 Conclusions – which action to take ?

This chapter began with a critique of the situation in international law regarding the trafficking in women. Despite many efforts and several instruments which could be used to tackle this activity, it continues to grow. Specific problems, particular to international law, have emerged as being weaknesses in the fight against trafficking. These include non-accession to or non-implementation of the instruments concerned, the lack of enforcement against reluctant states and a lack of redress for the victims, amongst others. Of these the two main problems seem to be non-implementation and non-enforcement. In the context of co-operation on criminal law at international level, it was noted that there are several instruments which aim to promote co-operation by penalising certain activity and providing mechanisms which facilitate co-operation.

The reasons why an instrument to tackle trafficking in women at EU level should be adopted were then discussed and it was concluded that this would indeed be appropriate. Further, although the competence of the EU to take an initiative is clearer under the third pillar, strong arguments could also be made for a Community instrument. The 15 have

²⁴⁸ “The [Member States] have very different legal systems and at once, for the same offense, there are different sanctions from one country to another.” Delmas-Marty: 1996, p 267, quoting Mr. Biancarelli.

taken some steps to counter trafficking, in particular by agreeing to implement certain measures by way of a (possibly) binding joint action on trafficking, but we must wait until the end of 1999 to see how this was done. The Hague Declaration has since 'encouraged further action' by specifying many additional measures which, it is hoped, will also be taken.

But what form should further action take ? The Birmingham declaration²⁴⁹ states that the application of the principle of subsidiarity must, in practice, lead to the utilization of "the lightest possible form of legislation with maximum freedom for Member States on how best to achieve the objective in question."²⁵⁰ How are we to apply the principle of subsidiarity in the context of trafficking in women ? As a transborder activity, any difference in the laws of the Member States could potentially work to the advantage of the traffickers. Thus a rather 'heavier' form of legislation which leaves as little freedom as possible is called for. In this context we may make the following remarks about the different types of legislative instrument discussed during the course of this chapter.

Under the first pillar the problems which can be caused for international cooperation on criminal matters would be avoided. Conversely this is the very argument which Member States are likely to employ against a first pillar initiative. Nevertheless, from the point of view of enforcement of a Member State's obligations and redress for victims, the supranational first pillar instruments are very attractive. With the exception of the provisions of Title IV EC, the competence of the Community is not clear, however, and could well be contested politically. The Member States could decide to make use of the Article 42 TEU procedure in order to use the first pillar to achieve a third pillar objective, in this case the harmonisation of criminal laws relating to trafficking in women.

The most obvious advantage of using this provision would be that a regulation on trafficking could be adopted, and thus there would be a single instrument directly applicable in all Member States. Directives, on the other hand, are similar to framework

²⁴⁹ Annexed to the Conclusions of the Presidency of the European Council of October 16, 1992.

²⁵⁰ Delmas-Marty: 1996, p 331.

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decisions under the third pillar, but may entail direct effect. At the current stage in the development of the Union it is to be doubted whether the Member States would be prepared to open their criminal laws to such intrusions by the EU. This is particularly so if one considers that once the Community has legislated upon an issue, the transfer of powers to the Community by the Member States, in relation to this issue, is irreversible.²⁵¹ Indeed any Member State who wishes to address such an issue must first consult the Commission.²⁵²

Most likely is a hybrid, or cross-pillar, approach with measures been taken at different levels, thus many very useful regulatory measures could be adopted by the Community, particularly under Titles III, IV, XI, and XIII EC. Issues such as harmonization of criminal laws could take place under the third pillar. Indeed the provisions on international agreements may well be used either on a bilateral basis, with countries of origin of victims of trafficking and transit countries, or within the framework of the UN or the Council of Europe where a unitary approach by the EU could be very influential. Given the need for an inter-disciplinary approach and the need to utilise and co-ordinate many different policy areas in order to combat the problem of trafficking in women, cross-pillar action is to be encouraged.

Nevertheless, a collection of different instruments scattered among the policy areas of the EU and its Member States must be seen as the result of a major EU initiative. One EU instrument on trafficking in women needs to be the focus point of co-ordinated action. For the reasons stated above, it is considered unlikely that such an instrument will be adopted under the Community pillar of the Union. Barely six years old, the third pillar of the Union is clearly where the Member States intend to tackle trans-national crime problems such as trafficking in women.

The two most useful instruments available are the convention and the framework decision, discussed above. Both could seek to harmonise the law of the Member States on

²⁵¹ Cappelletti, et al (eds.), *op cit.*, p 238.

²⁵² Case 269/80, *R. v. Robert Tymen* [1981] 2 CMLR 111.

trafficking in women. Conventions are essentially international treaties between the Member States and have, therefore, many of the disadvantages associated with these. The introduction of 'rolling ratification' will hopefully speed up the implementation of conventions, however.

Framework decisions, on the other hand, are binding instruments and may therefore allow a greater degree of harmonisation. In addition a deadline for implementation may be specified in framework decisions, if the practice of doing so in directives, under the first pillar, is followed. This would seem a logical step to take if Member States are to be 'bound' as to the result to be achieved. For these reasons, the framework decision is to be preferred above the convention.

Finally, the role of the ECJ in interpreting whichever type of instrument is used as a basis to tackle the trafficking in women would be an important one, as the interpretation by the Court of legal instruments prevents divergences between national legislation from defeating the purpose of harmonisation. For some the prospect of harmonising criminal laws is somewhat unpalatable. Harmonisation, however, is not the optimum solution for tackling trans-border crimes as, although approximated, the laws of the Member States remain different. How the Union might improve on this situation will be the subject of chapter three.

Chapter Three

One EU Law for the Future ?

3.1 Introduction.

To date we have dealt with the problem of trafficking in women, from the perspective of 15 Member States each with a different criminal justice system. The focus of this chapter, however, will be somewhat different as it will examine models for a single judicial area to deal with trafficking of women as a trans-national crime.

We may start by looking at the disadvantages of the options available under the current regime, discussed in the previous chapter, and then turn to consider how we may improve on these. This will involve highlighting the shortcomings of a harmonisation approach to trans-border crimes before examining moves towards a unified approach at EU level. The model of the USA, where interstate crime may indeed be tackled through a unified (federal) approach is certainly worth considering in this context and will be discussed after this. Moreover, some states of the (American) Union may agree to take action among themselves to tackle crime, amongst other issues, without binding the rest of 50 which do not wish to participate, in the form of interstate Compacts. Recalling the possibility of closer co-operation among the EU 15, such Compacts allow an interesting parallel with the Union's new provisions on flexibility to be made. In the light of the above, the chapter will conclude with a discussion about a unified approach to trafficking in women by the EU itself.

3.2 Harmonisation – a good solution, but not a great solution.

One of the main obstacles to progress is the nature of the EU instruments available to tackle trans-border crimes such as trafficking in women. Critics of these instruments find that they are 'scarcely binding on the Member States' and are 'superficial compared with

the efficient resources available under the first pillar'.²⁵³ Conventions are seen as 'too ponderous' since they are difficult to implement because the lengthy and cumbersome procedures required for ratification²⁵⁴ not to mention the many derogations, declarations and reservations which qualify them.²⁵⁵ Not surprisingly, the dual criminality rule is also seen as an obstacle to co-operation.²⁵⁶

Similarly, the reliance on the direct effect of instruments of the first pillar has been cited as a source of unhelpful uncertainty as regards criminal matters.²⁵⁷ Delmas-Marty believes that a combination of the principles of primacy and direct effect of Community law is not sufficient to ensure integration of the Community norm into national penal law.²⁵⁸ Rather, additional support needs to be forthcoming from domestic law. The need to integrate Community norms into national law has produced a 'dense web of national norms, more or less harmonised but never identical',²⁵⁹ which is confusing and impenetrable.

Swart points out that in any case harmonization of criminal justice is an extremely complicated and sensitive matter - more so than intensifying mutual cooperation and that despite the many things that the countries of the European Union have in common, in the field of criminal justice their differences can hardly be overestimated. He concludes that harmonization should only be attempted where not to harmonize would seriously

²⁵³ WIEBENGA, Jan-Kees. Report on criminal procedures in the European Union (Corpus Juris). European Parliament Committee on Civil Liberties and Internal Affairs, PE 229.274/fin., p 4.

²⁵⁴ DEHOUSSE, Renaud (ed.). *Europe: The Impossible Status Quo*. Basingstoke: Macmillan Press Ltd., 1997. p 85.

²⁵⁵ European Parliament Resolution on judicial cooperation in criminal matters in the European Union, [1998] OJ C104/267, at 269.

²⁵⁶ Ibid.

²⁵⁷ DELMAS-MARTY, Mireille. *The European Union and Penal Law*. (1998) 4 *ELJ* 87, at p 98. (Delmas-Marty: 1998)

²⁵⁸ She believes that this is 'readily apparent', loc. cit., p 98. The additional support from national penal law would seem to be necessary if one considers that Community instruments may not specify that criminal penalties are to be imposed. Only national law can do this. Ulrich Sieber has noted the same difficulty caused by the intervention of a second legislature: SIEBER, Ulrich. *Union européenne et droit pénal européen*. Proposition pour l'avenir du droit pénal européen. *Rev. sc. Crim.* (2), avr.-juin 1993, p 249, at p 254.

²⁵⁹ Delmas-Marty: 1998, loc. cit., p 110.

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jeopardize the interests of the interests of the European Union and the countries comprising it.²⁶⁰

Indeed, the European Parliament has acknowledged that “the road towards harmonization of criminal justice systems or the attainment of a sufficiently homogeneous European justice system will be long and arduous”.²⁶¹

Another observer, also of the opinion that the instruments used so far have not proved successful, and contends that the absurdity of opening our national frontiers to criminals whilst shutting them against those responsible for fighting crime risks turning our countries into ‘crime-havens’.²⁶²

If we accept that progress under the existing structures is failing to produce the results we would wish for, then naturally we must look for more acceptable alternatives. In this regard two models seem relevant. The first concerns the development of the law within the European Union in the near future, with the necessity to take action to combat fraud against the EU itself become a driving force in this direction. Secondly, we may extend our horizon further by considering how trafficking in women, and trans-border crime more generally, is dealt with in an established federal system, the USA, and how this compares to future models for a European approach to trans-border crimes such as the trafficking in women

3.3 ‘Euro-Crimes’

The notion of ‘Euro-crimes’ has slowly been emerging as a concept in recent years. The term ‘Euro-crime’ itself is not yet matured as a juridical concept and some believe that it

²⁶⁰ SWART, A.H.J. Cooperation in the Field of Criminal Law: some comments. IN: MONAR, Joerg and MORGAN, Roger (eds.). *The Third Pillar of the European Union. Cooperation in the fields of justice and home affairs*. Brussels: European Interuniversity Press, 1994, p 197.

²⁶¹ Resolution on judicial cooperation in criminal matters, [1998] OJ C104/267, point F.

²⁶² DONÀ, Gabriele. Towards a European Judicial Area ? A Corpus Juris introducing penal provisions for the purpose of the protection of the financial interests of the European Union. (1998) 6 *Eur. J. Crime Cr. L. Cr. J.* 282, pp 296-297.

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is only properly applied to crimes committed against the EU itself.²⁶³ Indeed, as was mentioned in the previous section, it is this latter category of crimes which has been driving the concept of 'Euro-crimes' forward.

Nevertheless, the term 'Euro-crime' is accepted as covering a diverse range of criminal activities that have trans-national characteristics and tendencies and there is a broad consensus among law enforcement agencies that international crime includes terrorism, organised crime, drug-trafficking, money-laundering, serious fraud, computer crime, traffic in persons and certain forms of theft.²⁶⁴ Thus, the category of 'Euro-crimes' can be applied to a series of individual criminal incidents or transactions, which in aggregate, have a European dimension.²⁶⁵

The history of our national systems shows that a legal community can be initiated according to a unification model or a harmonisation model.²⁶⁶ In the past there have been attempts to harmonise the criminal law of Member States in certain areas which, had they been successful, would have led to the existence of Community criminal law.²⁶⁷ The European Parliament has also maintained that Community bodies could legitimately legislate on criminal matters, at least in relation to the Union's financial interests.²⁶⁸

The endeavours to expand the use of sanctions in the fight against subsidy fraud coincide with, and indeed have acted as a catalyst for, the project of the European Community to create a supranational penal law.²⁶⁹ To create such a body of law will be no easy feat, however. The idea of 'Euro-crime' itself is a rather fragile one, being underscored by the legal faultlines between Member States. Thus the attraction of having one offence

²⁶³ Anderson, et al (eds.), *op cit.*, p 15.

²⁶⁴ *Ibid.* page 13.

²⁶⁵ *Ibid.* page 14.

²⁶⁶ Delmas-Marty: 1996, p 309.

²⁶⁷ See Sevenster, *loc cit.*, p 35.

²⁶⁸ Donà, *loc cit.*, p 287 note 21.

²⁶⁹ This is hardly surprising given that the judicial regime for the protection of the financial interests of the Community has been described as having "more holes in it than a Swiss cheese" in Delmas-Marty: 1996, p 9.

throughout the 15 Member States rather than 15 different (although harmonised) offences becomes evident.

Donà is also of the opinion that as means of protecting the financial interests of the EU the existing the methods of 'Assimilation', 'Co-operation', and 'Harmonisation' have proved to be inefficient and thus the only instrument which could be more effective is unification of criminal legislation of the Member States.²⁷⁰ In addition, it has been noted that the harmonisation model "does not appear to respond in a satisfactory way to the requirements of specificity and predictability which are the gage of legal security."²⁷¹

It appears that the concept of unified offences is now an accepted one, although there has yet to be an example of this. Two developments lead us to this conclusion, however. The first being a Convention drawn up under the 'third pillar' which has stated that the acceptance of a unified definition of certain crimes is its objective. Secondly, this approach is at the core of a proposal to bring about a European judicial area in order to combat community fraud.

3.3.1 The PFI Convention.

The Convention of 26 July 1995 on the Protection of the European Communities' Financial Interests²⁷² (PFI Convention) has been hailed as setting the Member States on the path towards establishing uniform definitions of what constitutes a criminal offence.²⁷³

Certainly, the aim of the PFI Convention is to unify penal definitions – its Preamble stating that 'a common definition should be adopted'. Article 2 leaves room for Member State action with regard to sanctions – conduct mentioned 'shall be subject to effective, proportionate and deterrent legal sanctions, including, at least in the case of serious fraud,

²⁷⁰ Ibid. page 297.

²⁷¹ Delmas-Marty: 1996, p 310.

²⁷² Adopted under Article K.3(2)(c) TEU as it then was. [1995] OJ C316/48.

²⁷³ Wiebenga, op cit., p 5.

custodial penalties on the understanding that serious fraud is to mean any fraud relating to a minimum amount to be set in each Member State of not more than 50,000 ECU.²⁷⁴

While the content of the PFI Convention may introduce some novel features, Delmas-Marty considers that the method used to introduce these is the standard one. “[T]he Convention continues to rely on the integration technique, converting the Community norm into domestic law; a technique shown to have the advantage of preserving national legislative sovereignty, but likewise the drawback of being a cumbersome process of norm production. As to the provisions which seek to harmonise sanctions, the integration technique is not specified, perhaps since their content is very vague. One may, however, assume that their integration would, where appropriate, be accomplished through the same process of conversion into domestic law.”²⁷⁵

Being well aware of the weaknesses of the traditional integration technique, it is perhaps no surprise that Delmas-Marty was central to the development of a very new and different approach to tackling ‘Euro-crime’ which has emerged in recent years and which will be discussed in the next section.

3.3.2 The *Corpus Juris*.

The *Corpus Juris* is a set of criminal law and criminal procedure provisions which are designed to protect the financial interests of the European Union.²⁷⁶ The aim is to ensure ‘in a largely unified European legal area, a fairer, simpler and more effective system of repression’.²⁷⁷ A different strategy is pursued by this initiative than has been the case previously as the concept of unifying rather than harmonising norms is at its core.

²⁷⁴ The first protocol to the Convention stipulates that penalties should involve the deprivation of liberty in serious cases. [1996] OJ C313/1, Article 5.

²⁷⁵ Delmas-Marty, loc cit., p 109.

²⁷⁶ The *Corpus Juris* was presented by the European Parliament and the Commission on the 15 and 16 April, 1997 and was then published in 1997; DELMAS-MARTY, Mireille (ed.). *Corpus Juris* – introducing penal provisions for the purpose of the financial interests of the European Union. Paris: Economica, 1997. (Delmas-Marty: 1997)

²⁷⁷ Ibid. p 40.

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Based on an analysis of the different options pursued to date in order to improve cooperation between the Member States of the EU on criminal matters, the authors of the *Corpus Juris* concluded that *assimilation* guarantees neither efficiency, nor justice, that *cooperation*, designed in order to increase efficiency, leads unavoidably to greater complexity; and finally that *harmonisation*, aimed at strengthening justice and efficiency, contributes to the complexity of the whole. From this they decided that the only way to join together the three qualities –justice, simplicity and efficiency – is by unification.²⁷⁸

Delmas-Marty has identified two dangers for European penal policy, being a ‘paper wall’ of unimplemented instruments and the problems caused by the non-identical laws of Member States which result from harmonisation.²⁷⁹ At this stage of European construction, the question is whether the three options referred to above are sufficient and “whether we must resign ourselves to waiting years and years for any slight improvement in the criminal justice system.”²⁸⁰ The unification path is thus seen as to overcome these difficulties.

The *Corpus Juris* is not a criminal code, nor a unified code of European criminal procedure but a set of penal rules limited to the penal protection of the financial interests of the European Union.²⁸¹ It proposes the establishment of a European legal area (Article 18) which will allow the complex procedures of bilateral cooperation to be avoided. A European Public Prosecutor (EPP) would be appointed who would have competence in the territory of all of the Member States (Article 24). A European arrest warrant could be issued to apprehend suspects regardless of where they are in the Union.

A European criminal court would not be established, however, and cases would be prosecuted in the national courts.²⁸² The criteria for choosing in which Member State a

²⁷⁸ Delmas-Marty: 1997, p 40.

²⁷⁹ Delmas-Marty: 1998, loc. cit., p 110.

²⁸⁰ Delmas-Marty: 1997, p 38.

²⁸¹ Delmas-Marty: 1997, p 40.

²⁸² With the rider: “We do not think for a moment that criminal courts across the Community can be made uniform. Delmas-Marty: 1998, p 116.

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case is to be tried would be either (a) the State where the greater part of the evidence is found, (b) the State where the accused has residence or nationality, (c) the State where the offence entails more economic consequences.²⁸³ There would be an appeal to the ECJ in three instances, namely for interpretation of *Corpus Juris*, in the case of a dispute concerning application of the *Corpus Juris*, and to decide on the rules of European territoriality, if a conflict of jurisdiction should arise. The idea of the ECJ as a court of final instance was decided against, however.²⁸⁴

The law to be applied will be that of the Member States. A unified definition of offences is set out as and in addition the *Corpus Juris* specifies the main penalties²⁸⁵ applicable as well as rules on criminal responsibility which are to be applied by the Courts. The ECJ may give preliminary rulings concerning the interpretation and application of the *Corpus Juris* and on conflicts of jurisdiction.²⁸⁶ In the case of the *Corpus* overlooking some points, the law applicable is that of the Member State (*lex fori*) where the offence is prosecuted, committed to trial or, if the case arises, where the judgment must be executed.²⁸⁷

The creation of such a European judicial area gives rise to a multitude of problems.²⁸⁸ In order to tackle these, some interesting developments are proposed, which would advance the *acquis communautaire* in the field of criminal law quite some way.

Firstly, Article 17(2) of the *Corpus Juris* provides that 'Where a single act constitutes a criminal offence according to the Community regulation and according to the national

²⁸³ Article 26(2) of the *Corpus Juris*.

²⁸⁴ Because of the risk of prolonging procedural delays and undermining the current balance between national courts and the ECJ. Delmas-Marty: 1997, p 122.

²⁸⁵ Which include the deprivation of liberty for five years or seven where there are aggravating circumstances and up to a maximum of three times the maximum penalty for the most serious offence in cases of concurrent offences – Articles 9, 16 and 17, respectively. This is in contrast to the PFI Convention which does not seek to establish common penalties.

²⁸⁶ Delmas-Marty: 1998, p 111.

²⁸⁷ The *Corpus Juris* does not claim to cover everything and its final Article (35) provides that where there is a *lacuna* in the *Corpus* national law is to be applied.

²⁸⁸ "...the differences in the various criminal justice systems throughout Europe make harmonisation difficult and hinder a truly effective level of co-operation between the judiciaries of Member States, Ibid. p 289.

regulation, only the former shall apply.' Thus the 'two sovereigns' problem is neatly avoided. It is also significant that the *ne bis in idem* (no double jeopardy) has been inspired by the ECHR²⁸⁹, thus underlining the importance of the latter in the field of criminal procedure.²⁹⁰

Secondly, as Delmas-Marty notes 'the age-old cleavage between inquisitory and accusatory procedures is overcome in favour of a truly European principle, that of "confrontational" proceedings, which rest upon a clear definition of the rights of the accused and prosecution and similarly structures the rules of evidence."²⁹¹ This new system is based on both the ECJ and the EctHR and is a synthesis of the two procedures in the common and civil law systems. It is to be seen 'not as a compromise abandoning the best facets of each model, but as progress over both.'²⁹² Significantly, the rights of the victim (the Commission where the Community is the victim) to act as plaintiff (*partie civile*) is recognised.²⁹³

It has been noted that if the Community is to have the benefit of a real criminal law, we must choose between two different philosophies. The first one is inspired by the principle of subsidiarity and is a question of making the Member States fully responsible for punishing infractions of Community law. It assumes, however, that incrimination and punishment have a basis in national law and also that there will be consistent judicial decisions among the Member States through the harmonisation of national laws or by the availability of an appeal at Community level. The second option is to take the federal route which would involve instituting elements of a true Community penal law such as statutes, police and a judiciary to deal with the resultant cases.²⁹⁴ It seems that the *Corpus Juris* presents Europe with a third option.

²⁸⁹ Article 4 and additional Protocol No. 7.

²⁹⁰ Delmas-Marty: 1998, loc cit., page 111.

²⁹¹ Ibid. page 112.

²⁹² Ibid. page 114.

²⁹³ If trafficking of women were to be prosecuted using this system some day this would be a strong defence of the victims' rights.

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• *Chlorophyll a*

Figure 1

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Thus the *Corpus Juris* combines the unification approach with the harmonisation approach. Delmas-Marty makes the point that harmonisation and unification are complementary rather than antagonistic processes, due to the fact that harmonisation is often a precondition for unification. Further, she states, harmonisation need not necessarily lead to unification, but may exist alongside it as the principle of subsidiarity would seem to imply that unification should only occur where respect for Community objectives cannot be achieved by other means. She concludes that at the present stage of European construction, it would seem desirable to restrict the process of penal unification to the sole area of EU financial interests.²⁹⁵

The significance of the *Corpus Juris* is not to be doubted, however. The area of fraud against the Community is the first 'Euro-crime' to be tackled and this will be through a combined approach comprising of harmonisation and unification. *A fortiori* in other areas, according to Delmas-Marty.²⁹⁶ This is why, despite the inevitable complexity accompanying it, it seems best for Europe now to take both routes simultaneously: harmonisation, which commands the evolution of penal law with the European Union, and unification, which leads to the creation of a penal law of the Union.²⁹⁷ The *Corpus Juris* may thus be the basis for future development of the penal law.²⁹⁸

3.3.3 The Implications for Trafficking.

The PFI Convention may be the start of a trend towards harmonising criminal offences and sanctions in the Member States of the EU. Building on this, the *Corpus Juris* provides for an entirely new system of prosecuting offences within the Union. It does not create a federal-type judicial system, but rather a system very peculiar to the uniqueness of the EU itself. National laws (although unified) would be tried by national courts,

²⁹⁴ LAMASSOURE, Alain. Objectives and principles of, and constraints on, a criminal policy for the European Community in the area of the legal protection of its financial interests. IN: Delmas-Marty: 1996, p 10.

²⁹⁵ Delmas-Marty: 1998, loc cit., pp 106-107.

²⁹⁶ Ibid. page 115.

²⁹⁷ Ibid.

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which would adopt the special procedures provided for by the *Corpus Juris*. The investigation and prosecution of offences would be conducted at the level of the Union, however. A novel approach to trans-border crimes, and one which could be very effective in prosecuting traffickers of women, it is submitted.²⁹⁹

Both the PFI Convention and the *Corpus Juris* concern the protection of the financial interests of the EU. At first sight one might dismiss any developments in such a limited area as exceptional rules for exceptional circumstances. Certainly fraud against the Community is best tackled at the 'European' level rather than at national level and due to the vast sums of money involved, the development of Community law in this area is, for now, rather unique.

Nevertheless, there are other crimes which are also best tackled at international level. Whether the Member States would be prepared to extend the category of crimes which may be dealt with under the procedure envisaged by the *Corpus Juris*, or a similar system, will depend on whether they view their interests in these areas as important enough to justify ceding sovereignty to the level of the Union. For the foreseeable future it does not seem that Member States will view the trafficking of women in this light. The related problems of organised crime and the difficulties in controlling migration have the potential to be of enough concern to governments for them to take this step, however. If the procedures under the *Corpus Juris* prove to be more efficient in combating fraud against the Community, this success may well have a spill-over effect with the result that they will be utilised to tackle other problems.

²⁹⁸ Donà, loc cit., p 297.

²⁹⁹ The European Parliament has called for the gradual establishment of a European criminal law system in which crimes such as trafficking in persons would be gradually harmonised and believes that the *Corpus Juris* might serve as an example for future development, with the EPP serving in parallel to national prosecutors in the medium to long term. Resolution on criminal procedures in the European Union, [1999] OJ C219/106, pp 107-108. The Parliament has also asked the Commission to report on the technical feasibility of the *Corpus Juris* and on what remedial action is necessary to remove incompatibilities in

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3.4 Trafficking and Federalism – The USA.

Of the various federal systems which exist around the globe, perhaps the USA is the one with which the development of the EU is compared most frequently. This is hardly surprising given the history of American integration and the particular federal structure to be found in the USA. Considering the trafficking in women, the federal anti-trafficking legislation and the possibility of co-operation among the states by way of Compacts are two developments in the USA which are worth considering, as a comparison may be drawn between the situation pertaining to the USA and that in the European Union.

Some distinctive features of the American federal structure are (1) that the criminal jurisdiction of the states and the federal jurisdiction overlap to a large degree and (2) each jurisdiction has its own system of criminal procedure and its own system of courts, prosecuting agencies for trying, prosecuting and investigating offences under its own laws. The federal criminal jurisdiction extends, for the whole country to the powers which are explicitly assigned to the federal government by the federal Constitution. Although there is no clear line between the criminal jurisdiction of the states and the federal jurisdiction, in case of conflict federal law is supreme by virtue of the Supremacy Clause³⁰⁰ of the US Constitution.³⁰¹

3.4.1 A Unified Law on Trafficking – The Mann Act.

An example of the instrument pursued by the present paper, an interstate law prohibiting trafficking in women, has long been in existence in the USA.³⁰² The American federal experience and the process of European integration have often been compared and in the context of trafficking in women we may make yet another link. Originally almost devoid of competence in criminal matters, the federal legislature passed the 'White Slave Traffic

national legislation, Resolution on criminal proceedings relating to the protection of the Union's financial interests [1998] OJ C138/61.

³⁰⁰ Article VI(2).

³⁰¹ Lensing, loc cit., pp 213-214.

Act' by using its powers to regulate commerce under the US Constitution in 1910. By way of introduction the Constitutional basis behind the Mann Act, as it became known, will be discussed before turning to the provisions of the Act itself.

(a) Federal Competence in Criminal Matters.

The power of the US Congress to regulate interstate commerce is based on Article I, section 8, clause 2 of the United States Constitution. As its name suggests, its original focus was trade between the several states, with foreign nations and with the Indian tribes. During the 19th Century the commerce clause in the US Constitution rose in importance as the improvements in transportation brought on by the industrial revolution made it possible for individuals to commit crimes or acts harmful to society in one state yet escape punishment as another state did not regard that act as criminal. A body of penal law thus began to develop as the commerce clause was used to criminalise such abuses.

The US Constitution gives to Congress specific competence to punish for transgressions of the law within the federal sphere. Specifically, Congress may provide for punishment for counterfeiting³⁰³ and piracy³⁰⁴ and enjoys exclusive competence to legislate for acts on federal territory.³⁰⁵ Article 1, section 8, paragraph 18 allows the Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers..." It seems that this did not include criminal punishment.³⁰⁶ How the practice developed of creating new federal offences is outside the scope of the current paper, but suffice it to say that by the time that trafficking in women became a topic of concern, at the beginning of the 20th Century, Congress had acquired the competence to enact federal criminal legislation.

³⁰² The USA is not a party to the 1949 Convention.

³⁰³ Article I, §8[6].

³⁰⁴ Article I, §8[10].

³⁰⁵ Article I, §8[17]

³⁰⁶ SURRENCY, Erwin C. History of the Federal Courts. New York: Oceana Publications Inc., 1987. p 111, citing Alexander Hamilton in the Federalist Papers.

(b) *The Mann Act.*

The Mann Act of 1910³⁰⁷ was introduced by virtue of the commerce clause in order to curb the trafficking of women. It has by no means been an uncontroversial enactment and has been described as "The most famous statute based upon the regulation of interstate commerce"³⁰⁸ although this notoriety was, no doubt, as a result of the extremely broad interpretation of the Act by the federal courts³⁰⁹ and the implications the Act had on the development of federal criminal law in general.

The Mann Act is a federal Act the legal basis of which is the commerce clause, discussed above. The Act prohibited the transportation of young women across state lines for immoral purposes. Somewhat removed from the more traditional issues of interstate commerce, many believed that Congress had exceeded its authority by using the commerce clause to promulgate a criminal law. When the Mann Act was challenged in the Supreme Court, however, the constitutionality of those decisions upholding the statutes defining crimes under the interstate commerce clause was affirmed. This marked a significant point in the extension of federal criminal law through the interstate commerce clause. The court stated "that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised.....to promote the general welfare, material and moral."³¹⁰

³⁰⁷ Stat. 825 (1910). The Mann Act was originally called the "White Slave Traffic Act" but this title was changed by an amendment of Congress in 1948, 62 Stat. 812.

³⁰⁸ Surrency, *op cit.*, p 120.

³⁰⁹ The Mann Act of 1910 made it a felony knowingly to transport women or girls in interstate or foreign commerce for the purpose of prostitution, debauchery, or any other immoral purpose. The broad interpretation of 'immoral purposes' by the federal courts resulted in prosecutions for adultery and polygamy, the convictions of the accused in the former instance being upheld by the Supreme Court (*Caminetti v. United States* 242 U.S. 470 (1917)).

³¹⁰ *Hoke v. United States*, 227 U.S. 308 (1912), at 322. Congress has the power under the commerce clause to regulate or totally prohibit certain types of commerce which promote immorality, dishonesty, or the spread of evil or harm to the people of other states from the state of origin; *Champion v. Ames*, 188 U.S. 321 (1903); *United States v. Darby*, 312 U.S. 100 (1941)

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Turning to the Mann Act itself, the current provisions³¹¹ are as follows;

§ 2421. Transportation generally.

“Whoever knowingly transports any individual in interstate or foreign commerce, or in any Territory or Possession of the United States, with the intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than five years, or both. (§ 2423 – 10 years for the transportation of individuals under the age of 18 years)

§ 2422. Coercion and enticement.

“Whoever knowingly, persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title or imprisoned not more than five years, or both.

As we have seen in chapter one, the concept of ‘White Slave Traffic’ applied to ‘forced prostitutes’. The Mann Act, however, was held to apply to the transportation of a willing prostitute.³¹² In addition, a potential customer of a prostitute could be indicted for a felony if he supplied her with a train ticket for interstate travel for the purpose of having sexual intercourse with her³¹³ although the prostitute herself could only be indicted for conspiracy to commit a felony if she were an active planner of the violation, and not merely if she consented to travel.³¹⁴

³¹¹ The Mann Act was amended significantly in 1986, 100 Stat. 3511 (1986).

³¹² *Hays v. United States*, 231 F. 106 (8th Cir. 1916), aff’d, 242 U.S. 470 (1917)

³¹³ *United States v. Beach*, 324 U.S. 193 (1945)

³¹⁴ *Gebardi v. United States*, 287 U.S. 112 (1932)

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(c) Discussion.

The Mann Act is a unified federal offence of trafficking. It will be noted that a cross-border element is always required, as it is this that gives the federal government jurisdiction. Indeed, even though trafficking persons for prostitution is a federal offence, it does not follow that prostitution need be illegal in the states themselves. This is a matter left within the competence of the states. Thus the states may tolerate at state level what they prohibit at federal level. This provides an interesting contrast to the situation in the EU where, it is felt, the ruling of the ECJ in *Adoui* and *Cornuaille* cases would work against such a solution.³¹⁵

3.4.2 Interstate Compacts.

The major device for interstate collaboration recognised in the US Constitution is the interstate compact. Art. I § 10, clause 1 of the US Constitution provides, *inter alia*, that "No State shall enter into any Treaty, Alliance or Confederation..." Clause 3 of that same section provides an exception to this, however, by stating that no State "shall, without the Consent of the Congress,enter into any Agreement or Compact with another State or with a foreign power."

Interstate compacts have been used to deal with a wide variety of interstate and regional problems, including crime control. It appears that a Compact is to be distinguished from a Treaty, the States being "positively and unconditionally forbidden to enter" into the latter.³¹⁶ A Compact, on the other hand, "is merely more formal than an 'agreement'".³¹⁷ It has been held, however, that notwithstanding the wording of the Constitution, not all interstate agreements require congressional consent.

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³¹⁵ [1982] ECR 1665, chapter two, *supra*.

³¹⁶ *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840), at pages 570-571.

³¹⁷ *Virginia v. Tennessee*, 148 U.S. 503 (1893), at page 520.

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In *Virginia v. Tennessee*, the Supreme Court³¹⁸, stated that the compact clause is directed at the formation of any combination “which may tend to increase [the] political influence of the contracting states” so as to “impair the supremacy of the United States,” and that there are “many matters upon which different States may agree that can in no respect concern the United States.”³¹⁹

Congressional consent is therefore required of any agreement which increases the political power of the States or which encroaches upon the supremacy of the United States. Other agreements, however, do not require the consent of congress.³²⁰ This latter type of agreement, is not the same as several states’ enactment of a uniform state law, as a compact is effected through reciprocal state legislation.³²¹

The effect of interstate compacts vis-à-vis federal law would now seem to settled and has been summarised by the Supreme Court as follows:

“Congressional consent is not required for interstate compacts that fall outside the scope of the Compact Clause.... But Congress has authorized the states to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States’ agreement into federal law under the Compact Clause.”³²²

And thus,

³¹⁸ Ibid.

³¹⁹ GUNTHER, Gerald. *Constitutional Law*. 12th ed. Westbury: The Foundation Press, Inc., 1991. Pp 309-310.

³²⁰ Although a literal reading of the “compact clause” of the Constitution would suggest that all agreements required congressional approval, such an approach was rejected in *United States Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978) which accepted the position laid down by *Virginia v. Tennessee*.

³²¹ HAY, Peter and ROTUNDA, Ronald D. *The United States Federal System: Legal Integration in the American experience*. New York: Oceana Publications Inc., 1982. p 189. The Supreme Court was agreed that “[a]greements effected through reciprocal legislation may represent opportunities for enhancement of state power at the expense of the federal supremacy” in *United States Steel Corp.*, *supra*, at pages 470 and 491.

³²² *Cuyler v. Adams*, 449 U.S. 433 (1981), at p 440 (footnote omitted).

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"...the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question."³²³

It has also been opined that although interstate compacts are based on the laws and constitutions of the participating states and not federal law, "...if the compact system is to have vitality and integrity, [a state] may not raise an issue of ultra vires, decide it, and release herself from an interstate obligation."³²⁴ In this respect the effect of compacts is similar to that of obligations undertaken by countries under international law.

3.4.3 Compacts versus Closer Co-operation.

The most central point concerning Compacts, for the purposes of our discussion, is that once an issue is 'federalised' through a Compact, the states parties to it have transferred sovereignty to the federal level. The Supreme Court can thus ensure a uniform application of the law. Thus, the interstate Compact is a remarkably similar device to the provisions on closer co-operation provided for in the EC Treaty and the TEU, as discussed in chapter two. Consequently, two brief points may be made.

Firstly, were a majority of the Member States of the European Union to decide to use the closer co-operation provisions of the treaties to take an initiative on trafficking in women, it is most likely that this would occur under the third pillar, for the reasons discussed in chapter two. An agreement between American States, which is not a Compact, has effects similar to that of a Convention under the TEU, before the changes made by the Amsterdam Treaty, as they are implemented by reciprocal state laws without the possibility of interpretation by the federal Supreme Court.³²⁵ Conversely, Compacts have

³²³ Ibid., at p 438. It had been held in an earlier case that the Supreme Court must have the power to interpret interstate compacts as it has the power to settle disputes between the States where there is no compact, under "federal common law" *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22 (1951), per Justice Frankfurter at page 28. This is certainly in contrast to the situation regarding disputes between the Member States of the European Union.

³²⁴ *West Virginia ex. Rel Dyer v. Sims*, supra, at page 35.

³²⁵ Although issues arising from agreements between States which do not fall within the ambit of the Compact Clause of the Constitution may also be decided by the Supreme Court under 'federal common law'.

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effects more like a Framework Decision may be expected to have, as it must be applied uniformly, and this is ensured by the Supreme Court.



Secondly, a question which arises concerning closer co-operation, is whether the Member States may withdraw from the agreement ? This is a classical problem faced by treaties at international level. The provisions on closer co-operation do not mention this possibility. It is submitted, however, that Member States may not withdraw from their commitments under the closer co-operation provisions. Just as the Member States may be estopped from not complying with their commitments under third pillar instruments, as discussed in chapter two, they may equally be estopped from repudiating an agreement to co-operate more closely.

Returning to the interstate Compacts in the USA, there is a strong body of thought in favour of this view regarding Compacts. In *West Virginia v. Sims*,³²⁶ Mr. Justice Jackson found that West Virginia was estopped from withdrawing from the Compact in question, stating;

“Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is sovereign in the field. After Congress and sister States had been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act.”

3.5 Chapter Conclusion

In the first part of this chapter, recent developments concerning the enforcement of criminal sanctions at EU level were considered. While the provisions of the PFI Convention and the *Corpus Juris* apply to the protection of the financial interests of the Community only, it was submitted that as the concept of criminal law at EU level

³²⁶ *Supra*.



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becomes more accepted, Member States might be willing to use procedures at EU level to combat criminal problems which are common among the Member States. Trafficking in women is an activity which could be tackled successfully through such mechanisms.

The European Parliament believes that one of the objectives of the Union should be to simplify the relationship between the citizen and the judicial system by creating a European legal and judicial area, which in turn, must be accompanied by full parliamentary and judicial control.³²⁷ Certainly an essential safeguard of fundamental rights and democracy is that criminal laws be enacted by a democratically elected legislature and be subject to the judicial control of the courts in their application. From this perspective we can see that the EU is not yet in a position to guarantee these principles.

History shows us that the criminal law was central to the development of the state. Thus the reluctance of the Member States to part with this symbol of state sovereignty can be expected to remain for some time. But this a reluctance only as in reality purely national responses to trans-border criminality is not a solution, and the Member States have recognised this. "By admitting that transnational crime is a genuine threat to the internal security of the EU Member States politicians are forced to concede that it must be combated at the international level."³²⁸

History also tells us, however, that beginning with budgetary control, the national parliaments have captured the rule-making power and have imposed a judicial control.³²⁹ In addition the inefficiencies resulting from the coordination of the legal systems in 15 Member States are working against the common aim of putting an end to activities such as the trafficking in women. The unification of Germany in the nineteenth century was used as an opportunity to overcome just such problems - perhaps another historical precedent which the EU may find itself following in the future.

³²⁷ Resolution on the draft action plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice, [1999] OJ C219/61, point 16.

³²⁸ Anderson, et al, op cit., p 73.

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The Mann Act in the USA is an interesting glimpse at how a unitary trafficking offence could look like. As the EU is heading in the direction of unitary criminal offences and a single judicial area, although limited to the sphere of fraud against the Community for the time being, it is instructive to note that the federal Act which sought to counter trafficking played a central role in the development of federal competence in criminal matters in the USA. The Mann Act also serves to prove that the creation of an offence at federal level does not necessarily mean that states lose competence to legislate on related issues at state level.

The comparison of closer cooperation at EU level and Interstate Compacts in the US was used to demonstrate that 'flexibility' in inter-state approaches to issues such as crime not exceptional, and further that closer co-operation may indeed be a powerful and effective tool in the fight against trafficking in women. Given the discrepancies in Member State legislation one of the core issues of trafficking – prostitution, this is welcome news.

³²⁹ Delmas-Marty: 1996, p 5.

Conclusion

The trafficking of women into the European Union is likely to remain an important issue and a difficult challenge for the Union in the years to come. Indeed, with the increasing involvement of organised crime it may become a self-perpetuating phenomenon. Cooperation with countries of origin and the transit countries which border the EU will be an important part of the strategy to prevent this activity. While the demand for trafficked women continues within the Union, however, the task of combating trafficking will remain a difficult one.

In the present paper, the problem of arriving at an agreed concept of what constitutes trafficking in women was examined. It will be recalled that there is a lack of focus as different parties believe that different issues should be addressed. Difficulties arise over notions such as the level of coercion exercised over victims, whether a border crossing is relevant, whether 'forced' prostitution is the correct focus of anti-trafficking efforts or whether a wider concept of sexual exploitation is preferable. It was concluded, however, that there is very little between the respective positions. Some Member States seek to regulate prostitution, the majority do not. A common definition of sexual exploitation as constituting 'forced prostitution' at least has been agreed by the Member States in the context of the joint action on trafficking. This is the lowest possible standard. There is no reason, however, why efforts to combat trafficking should be restricted by a minority of Member States. Indeed, it was noted that determining whether force is involved in prostitution situations may result in difficulties in prosecuting traffickers, and that reversing the burden of proof in relation to the use of force might be a preferable option.

The major advantage of an instrument adopted by the EU would, simply, be that it would work. The level of cooperation and planning that may be undertaken at EU level far surpasses what could be achieved by the International organisations. An EU instrument could therefore be more ambitious and the interpretation by the ECJ of the provisions of an EU trafficking instrument would ensure a uniform interpretation of the law in each

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Member State. The role of the ECJ in ensuring a similar level of sanction for breaches of Community law would be another benefit in this regard.

A first pillar instrument would result in maximum enforcement possibilities and would also confer rights on victims who had suffered as a result of state inaction. More likely, however, is a third pillar instrument, with framework decisions being preferred over conventions, not least because conventions are international treaties, the inadequacy of which has contributed to the current problems of addressing trafficking. In addition, the Commission and the Council, in their plan of action on how to implement the Amsterdam Treaty, have identified trafficking in human beings as a 'prime candidate' for the establishment of minimum rules – a task best suited to framework decisions. Ideally one would like to see a cross-pillar approach, with a series of initiatives in different policy areas, but centred on a strong EU instrument on trafficking.

With a well co-ordinated approach, the EU could also use the relevant treaty provisions on international instruments to encourage more action at the international level. Indeed the prospect of the EU as a dynamic actor on the international stage in the context of the fight against trafficking is in keeping with the strong interest which the Commission has shown in this issue in recent years. An opportunity for such an approach to be taken exists at the moment, regarding the UN Protocol on trafficking, and it is to be hoped that the EU takes this opportunity.

The final chapter of this paper offered a brief glimpse at the future of how trans-border crime may be tackled by the EU. A European judicial area, established by the *Corpus Juris*, may be the first step towards a truly European approach to problems which are facing the Union as a whole. It seems that the trafficking in women would be a suitable matter for an extension of such a system, as it combines the serious threat posed by organised crime with the need to protect the human rights of victims of trafficking.

The present paper is not intended to be a neo-functionalist argument, however. When considering the creation of a European criminal system, we would be wise to recall the words of Montesquieu when he said:

“There are many ideas of uniformity which sometimes seize the great minds.....They see a type of perfection which they recognise because it is impossible not to discover it: the same role for the police, the same rules in commerce, the same laws for the State, the same religion for all....And the greatness of genius, would it not better consist in knowing in which case there should be uniformity and in which case difference ?”³³⁰

It is true that many instances of crime are best dealt with at national level and through inter-state cooperation, where necessary, as is the case today. It is submitted that the trafficking in women is not one of them, however.

With the growing internationalisation of society criminal problems no longer fit neatly into national jurisdictions. Less so for the Member States of the EU, who have removed the internal borders but still insist on preserving sovereignty over criminal matters. This is not a situation which we must allow to continue indefinitely. The emergence of a penal law at European level, to tackle trans-border crimes as they should be tackled, will tilt the balance in the fight against the trafficking of women away from the traffickers.

³³⁰ From Twenty-ninth book of *De l'esprit des lois*. Quoted in Delmas-Marty: 1996, p 307.

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Figure 1. The effect of the concentration of the *Agrobacterium* suspension on the transformation efficiency of *Agrobacterium* strains.

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